

Fordham International Law Journal

Volume 16, Issue 2

1992

Article 5

From Association to Accession - An Evaluation of Poland's Aspirations to Full Community Membership

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Anne Wagner-Findeisen

Abstract

This Article has as its topic a legal assessment of Poland's aspirations towards full Community membership. This Article also postulates that the EC must continue to be mindful of maintaining the current momentum of rendering meaningful economic, legal, and political assistance to Poland, Czechoslovakia, and Hungary and so transform previously successful short- and medium-term measures into an effective long-term plan, with a view toward furthering these countries' quests for membership.

FROM ASSOCIATION TO ACCESSION— AN EVALUATION OF POLAND'S ASPIRATIONS TO FULL COMMUNITY MEMBERSHIP*

*Anne Wagner-Findeisen***

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* This Article is being published as the recipient of the 1992 Barry E. Hawk Memorial Prize Essay. The Barry E. Hawk Memorial Prize Essay, created to honor the contributions of Professor Barry E. Hawk to the creation of the Graduate Program, is awarded to the LL.M. student in the Graduate Seminar who produces an outstanding Masters thesis in the International Business and Trade Law concentration.

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INTRODUCTION

The year 1992—much heralded and long awaited—has arrived and ended. At the end of 1992, the European Economic Community (the "EEC," "EC," or "Community")¹ was to transmogrify into a single, colossal market of 340,000,000 Europeans, characterized by free movement of goods, persons, services, and capital.² This ultimate coalescing of free and unhampered trade unfolded pursuant to the amendments to the

1. The term "Community" refers to three "communities." Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958), *amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [treaty as amended referred to hereinafter as EEC Treaty]; Treaty Instituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 (1957) [hereinafter ECSC], founded in 1951; and the EURATOM, Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167 (unofficial English translation). Over the years, the term "Community" has come to signify primarily the European Economic Community and the two have become loosely interchangeable.

2. EEC Treaty, *supra* note 1, art. 8b.

EEC Treaty in the Single European Act (the "SEA").³ As 1993 begins, it appears that the single market will indeed be a reality.

In designing and implementing the 1992 objectives, Community leaders did not, nor could they have, reckoned with 1989. Described by certain scholars as the "Autumn of the Peoples,"⁴ 1990 and 1991, with breathtaking speed, ushered in geopolitical redefinitions of the eastern end of the European continent. The Community's brainchild, the single market, will thus be born into a radically altered and infinitely more complex geopolitical context than formerly envisaged. A new Europe has emerged, the economic, political, and security parameters of which are far from fully solidified.

The constituent components of the new Europe, those countries formerly generically labeled "Eastern European" countries, have assumed a new nomenclature. "East Central Europe," also most recently referred to as the "Visegrad Trio," is generally understood as comprising Poland, Czechoslovakia, and Hungary.⁵ Czechoslovakia is now the Czech and Slovak Republic, or CSFR.⁶ The "Baltic states" in turn comprise Estonia, Lithuania, and Latvia. Yugoslavia has disintegrated into subparts of its former self, as has the Soviet Union, as evidenced by the reappearance of Ukraine, Byelorussia, and others in the "Confederation of Independent States" (the "CIS"). New nations will continue to emerge, further altering the geopolitical landscape. All of the new players on the horizon, however, share the same propensity for looking to the

3. Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 (amending EEC Treaty, *supra* note 1).

4. Wiktor Osiatynski, *Revolutions in Eastern Europe*, 58 U. CHI. L. REV. 823, 824 (1991); see generally Charles Gati, *East-Central Europe: The Morning After*, 69 FOREIGN AFF. 129 (Winter 1990/1991).

5. The term refers to a meeting held by the three countries in Visegrad, Hungary in February 1991 to discuss common issues such as security and economic policies.

6. *Czech and Slovak Governments Open Second Round of Talks*, CTK National News Wire, Oct. 25, 1992, available in LEXIS, Nexis Library, OMNI File. Czech and Slovak officials are currently negotiating aspects of future cooperation after the federation splits, such as the establishment of a customs union, a monetary union, and partial agreements concerning the movement of persons and goods. *Id.* As this Article was going to print, Czechoslovakia had split into two new nations, the Czech Republic and Slovakia. Michael Matthews, *The Clintons, A Czech-out, Maybe a Knockout—and Annie, Too. . .*, NEWSDAY, Jan. 1, 1993, at 94.

West for everything from the codification of their newly emerging democratic constitutions, to hard cash handouts, credits, and various forms of aid. In looking to the West, moreover, the gaze of these new countries has understandably fixated on the "success story" that is the European Community. The East Central European states separately articulated as early as 1989 their ultimate objective of achieving full Community membership.⁷ It is with these three states that the EC, in mid-December 1991, concluded three distinct "association agreements,"⁸ which in EC parlance have been denominated as "the Europe Agreements," ostensibly to reflect the nature of the unique new types of links between these three countries and the EC.⁹ The preambles to the Europe Agreements expressly recognize the membership goals of the associates, but fall far short of committing the Community to extending future membership privileges to any one of the associate countries.¹⁰ With the Baltic and even some of the CIS countries lining up behind them, there may be several dozen candidates for EC membership by 1996 since concurrently, and at least in part for some of the same reasons, an ever-increasing number of Western European countries is seeking or intends to seek admission to the EC.

This Article has as its topic a legal assessment of Poland's

7. *EEC/Eastern Europe: Commission Prepares Talks on Closer Cooperation*, Eur. Rep., No. 1578, Apr. 12, 1990, at 8, available in LEXIS, Europe Library, ALLEUR File.

8. See EEC Treaty, *supra* note 1, art. 238. Association agreements are provided for in Article 238 of the EEC Treaty as follows:

The Community may conclude with a third State, a union of States or an international organization agreements establishing an association involving reciprocal rights and obligations, common action and special procedures.

These agreements shall be concluded by the Council, acting unanimously and after receiving the assent of the European Parliament which shall act by an absolute majority of its component members.

Where such agreements call for amendments to this Treaty, these amendments shall first be adopted in accordance with the procedure laid down in Article 236.

Id.

9. Commission Press Release, IP (91) 1033 (Dec. 23, 1990). Czechoslovakia, which split in 1993, would like to see its association agreement transferred to both new states. *CSFR Delegation Leaves for EC-Visegrad Talks in London*, CTK National News Wire, Oct. 27, 1992, available in LEXIS, Nexis Library, OMNI File.

10. O.J. L 114 (1992) (Poland), O.J. L 115 (1992) (Czechoslovakia), and O.J. L 116 (1992) (Hungary) [hereinafter Europe Agreements].

aspirations towards full Community membership. Any such evaluation must, a fortiori, include an examination of how the Single European Act, as yet untested on the issue of accession, may impact upon the legal aspects of "association" agreements such as that concluded with Poland; how the new European landscape has caused the Community to reexamine its *raison d'être* and arguably prompted the controversial Treaty on European Union,¹¹ reached in Maastricht, the Netherlands, in late 1991; the current and probable wait-list for membership; the "boomerang" impact of this expanding wait-list on Community policies concerning accession; the genesis of Poland's, Hungary's, and Czechoslovakia's current status as "associates" of the Community; the legal and political processes that resulted in the terms and conditions set forth in the particular Europe Agreement that was concluded with Poland; the Europe Agreement as a probable critical path toward membership; and a discussion of the new legal mechanisms that Poland must successfully adopt and implement prior to any future accession.

This Article also postulates that the EC must continue to be mindful of maintaining the current momentum of rendering meaningful economic, legal, and political assistance to Poland, Czechoslovakia, and Hungary and so transform previously successful short- and medium-term measures into an effective long-term plan, with a view toward furthering these countries' quests for membership. This Article urges that the Community refrain from the dilatory tactics and stopgap measures it has evinced vis-à-vis certain earlier applicants such as Turkey. It also suggests that prior accessions to the Community, in particular those of the less affluent Member States such as Greece, Portugal, and Spain, demonstrate the feasibility and desirability of allowing Poland to join. The viewpoint espoused in this Article, however, does not extend so far as to suggest, as have other legal commentators, that only a guarantee of full Community membership can ensure the completion of the transition to democracy and a market economy in countries such as Poland.¹² Irrespective of Community accession, Poland is

11. This is in addition to monetary union. See *infra* notes 89-90 and accompanying text.

12. Cf. Romana Sadurska, *Reshaping Europe or "How To Keep Poor Cousins in (Their) Home": A Comment on The Transformation of Europe*, 100 YALE L.J. 2501 (1991)

acutely aware of the economic quagmire caused by Communist policies and sees no alternative but to pursue democracy and a free market economy.¹³ The argument that the EC has a moral imperative¹⁴ to ensure membership is persuasive, albeit unlikely to be a determining factor. It would simply appear highly counterproductive for the EC to allow the next decade to lay the basis of a new bi-polarization of Europe, even in the form of a primarily economic barrier. Western Europe's self-interest in stability in the East should justify certain sacrifices on its part. The Community should therefore continue its policy of investing in the democratic future of Europe¹⁵ and actively prepare those of the new democracies that are objectively capable of being integrated into the West, so as to fully realize the original objectives of the founders of the Community. Only then will true peace and prosperity be realized on the European continent.

*I. KNOCKING AT THE EC'S DOOR—THE RECENT
CONVERGENCE OF EUROPEAN GEOPOLITICAL
TRENDS RESULTING IN THE CURRENT
WAIT-LIST*

A. Bases of the European Economic Community

The phenomenon of an ever-increasing line of would-be members standing outside the gates of the EC is the obvious and most visible result of the sudden convergence of largely unforeseen and unplanned historical events in that part of Europe lying geographically east of the EC. The total economic and political collapse of the communist system of centrally planned economies, juxtaposed with the EC's steady, progressive realization of carefully orchestrated and meticulously crafted Community concepts such as "single internal market," "economic monetary union," "European Political Cooperation," and "political union," evidences cause for concern.

(commenting on J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403 (1991)).

13. See Jan Krzysztof Bielecki, *Poland: No Retreat From Democracy*, *WASH. POST*, Feb. 15, 1992, at A26.

14. See generally GILES MERRITT, *EASTERN EUROPE AND THE USSR: THE CHALLENGE OF FREEDOM* (1991).

15. Prodromos Dagoglou, *The Southern Enlargement of the European Community*, 21 *COMMON MKT. L. REV.* 149 (1984).

The EEC Treaty's provisions governing accession to the EC are deceptively simple. Because under Article 237 "[a]ny European State may apply" for membership,¹⁶ it would appear that the sole criterion is for an applicant state to be European.¹⁷ Successive expansions of the Community have clarified that principles of pluralist government and respect for human rights are essential prerequisites for accession.¹⁸ As Professor Jochen Frowein aptly points out in his analysis of the EEC Treaty's implicit requirement that the *sine qua non* of Community membership is "a republican form of government," today's European Community "cannot be understood without taking into account European history after 1933."¹⁹ Clearly the same holds true for any understanding of the Community of the future. The discussion of recent events occurring in Europe, and the Community's reaction thereto, is grounded in the conviction that any projected future parameters of the Community are by definition intertwined with and fully dependent upon the same fundamental legal principles that led to its original inception. The first President of the EC Commission, Walter Hallstein, identified two such governing principles, the rule of law and democracy.²⁰ Accordingly, the preamble to the EEC Treaty²¹ refers to the determination of its

16. EEC Treaty, *supra* note 1, art. 237. Article 237 of the EEC Treaty states that [a]ny European State may apply to become a member of the Community. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament which shall act by an absolute majority of its component members.

The conditions of admission and the adjustments to this Treaty necessitated thereby shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the Contracting States in accordance with their respective constitutional requirements.

Id.

17. Dagtoglou, *supra* note 15, at 149.

18. *Id.*

19. Jochen Abr. Frowein, *The European Community and the Requirement of a Republican Form of Government*, 82 MICH. L. REV. 1311 (1984).

20. *Id.*; John Temple Lang, *The Development of European Community Constitutional Law*, 25 INT'L LAW. 455 (1991).

21. See EEC Treaty, *supra* note 1, pmbl. The preamble's conclusion is worded as follows: "RESOLVED, by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts, HAVE DECIDED to create a European Economic Community" *Id.*

six founding members to preserve and to strengthen peace and liberty. The preamble, therefore, embodies the Community's ideal that Member States be so inextricably tied to each other that war becomes "unthinkable."²²

Although political scientists and legal scholars differ in attributing the original philosophical inspiration that led to the foundation of the European Economic Community on precisely such principles,²³ there is general agreement that the EC's position as the soundest and longest-standing guarantor of peace in Western Europe results from its being based on "mutual interdependence between free and democratically organized polities."²⁴ As originally constituted under the EEC Treaty in 1957, the EC comprised six Member States²⁵ and functioned by means of four Community institutions.²⁶ These institutions remain unchanged today except for their size.²⁷ Although the impetus for the Community's creation was political,²⁸ links between the Member States in the initial years of the Community's existence were grounded primarily in an ever-growing body of primary and secondary trade legislation. Gradually, by virtue of the power vested in it to interpret both the EEC Treaty and the actions of the Community institutions, the European Court of Justice (the "Court of Justice"), in successive rulings, defined and crystallized the nature of the inter-relationship between Community law and the national laws of the respective Member States, spelled out the nature of the

22. *Id.*; see Dennis Thompson, *The Common Market: A New Legal Order*, 41 WASH. L. REV. 385 (1966) (stating that "[i]t was an attempt to contain the conflicts which had ravaged Europe in the past and which would undoubtedly continue to chafe in the future within a peaceful institutional system"); *What A Community*, ECONOMIST, Nov. 2, 1991, at 13 (stating that "the EC's underlying ideal [is] that its members should be so entwined that war between them would be unthinkable").

23. Some attribute the idea to Franklin Delano Roosevelt's concept of "one world." See, e.g., Joachim Krause & Peter Schmidt, *The Evolving New European Architecture—Concepts, Problems, and Pitfalls*, 13 WASH. Q. 79 (1990). Others credit 19th century French writer Victor Hugo. AXEL KRAUSE, *INSIDE THE NEW EUROPE* 46 (1991).

24. Krause & Schmidt, *supra* note 23.

25. France, West Germany, Belgium, the Netherlands, Luxembourg, and Italy were the original members of the EC.

26. See EEC Treaty, *supra* note 1, art. 4 (1). The Community institutions were the Council, the Commission, the European Parliament, and the Court of Justice. *Id.*

27. Consistent with the provisions of the EEC Treaty, the size and composition of the institutions increased with each successive accession to the Community.

28. Sadurska, *supra* note 12, at 2502.

Community's legal personality,²⁹ and delineated its exclusive competence in external relations as provided for in Article 113 of the EEC Treaty.³⁰

B. Emergence of European Political Cooperation as the Logical Corollary to the Formation of a Common Market

In furtherance of its Common Commercial Policy,³¹ the EC, on behalf of the Member States, actively built up a wide network of trade-based relations around the world. Various forms of agreements were entered into including "trade and cooperation agreements," "association agreements," and a wide variety of multilateral and bilateral treaties. Many of the agreements were made between the EC and the same countries which today are seeking full admittance to the EC.

The founders of the Community fully understood that the EC's internal economic policies would, in time, inevitably produce significant external effects on its trading partners and its geographically proximate neighbors and that such policies could therefore never really be foreign-policy neutral.³² It was not until a dozen years had elapsed from the EC's inception, however, that the Member States formally articulated their acknowledgment of this dynamic, having previously demonstrated unwillingness to relinquish any further the exercise of national sovereignty to the Community's institutions.³³ In 1969, the Member States somewhat cautiously agreed to an ex-

29. EEC Treaty, *supra* note 1, art. 210. Article 210 of the EEC Treaty grants the Community legal personality. Powers to conclude international agreements are conferred on the Community either expressly or implicitly by the EEC Treaty. See EEC Treaty, *supra* note 1, art. 210; see also Jacques H. J. Bourgeois, *Effects of International Agreements in European Community Law: Are the Dice Cast?*, 82 MICH. L. REV. 1250 (1984).

30. EEC Treaty, *supra* note 1, art. 113. Traditionally, the Community has "no legal powers in the spheres of foreign policy or defense." Temple Lang, *supra* note 20, at 463. Mr. Temple Lang also points out that "[t]he powers of the Community over 'commercial policy' (that is, trade policy and a wide but so far imprecisely defined area of other external economic relations) were declared to be exclusive by the Court, not by the treaty itself." *Id.*

31. EEC Treaty, *supra* note 1, arts. 110-16. The Common Commercial Policy laid down in Articles 110-116 of the EEC Treaty is based on the coordination of Member States trade relations with third countries, resulting in a common policy toward external trade. *Id.* art. 111.

32. See Note, *A Community Within the Community: Prospects for Foreign Policy Integration in the European Community*, 103 HARV. L. REV. 1066 (1990).

33. For example, France, in the mid-1960s under De Gaulle, insisted on a de

periment in "European Political Cooperation" ("EPC")³⁴ the evolution of which was to be on a track separate and distinct from the more commercially oriented provisions of the EEC Treaty.³⁵ Encouraged by the initial results of EPC at the Paris Summit of 1974, EC leaders agreed to create a European Council.³⁶ This was followed in June 1982 by the Solemn Declaration on European Union at Stuttgart that was intended to strengthen and reinforce EPC.³⁷ All the while, the Community was attracting new members and steadily increasing in size.

C. The Single European Act—Codification of EPC and Expansion of the European Parliament's Powers Concerning Association and Accession

The early 1980s were characterized by a period of stagnation as "[t]he sense of community was draining out of the European Economic Community."³⁸ A radical renewal of communal purpose, however, evidenced itself in the mid-1980s following the issuance of the EC Commission's now-famous White Paper.³⁹ This set the stage for the Community's shift in focus from a "common market" to a "single market." The White Paper identified the specific intra-Community barriers (fiscal, technical, and physical) that needed to be abolished on an intra-Community basis and proposed a timetable for this purpose. Galvanized by the Commission's recommendations and far-reaching vision, the Member States endowed that vi-

facto veto power over any Community action that a Member State would deem a threat to its "vital interests." See generally Thompson, *supra* note 22, at 404.

34. Report by the Foreign Ministers of the Member States on the Problems of Political Unification, 3 E.C. BULL., No. 11, at 9 (1970). The Member States subsequently agreed to codify the EPC in Title III of the Single European Act. See Single European Act, *supra* note 3.

35. James Elles, *The Foreign Policy Role of the European Parliament*, 13 WASH. Q. 69, 70 (1990). "EPC is the natural result of the recognition that the sharing of sovereignty entailed in economic integration must be accompanied by some degree of political integration." *Id.*

36. *Id.*

37. See Hans-Joachim Glaesner, *The Single European Act: An Attempt at an Appraisal*, 10 FORDHAM INT'L L.J. 446, 447 (1987).

38. Flora Lewis, *Alarm Bells in the West*, 60 FOREIGN AFF. 551, 557 (America & the World 1981).

39. AUDREY WINTER, ET AL., *EUROPE WITHOUT FRONTIERS: A LAWYER'S GUIDE 4* [hereinafter WINTER] (citing Commission of the European Communities, Completing the Internal Market: White Paper from the Commission to the European Council, COM (85) 310 (June 1985)).

sion with the force of law, in the form of the Single European Act, the first body of amendments to the EEC Treaty.⁴⁰

As mentioned at the outset of this Article, all outward indicia of "Europe 1992," that the world is witnessing today, are the direct intentional results of the SEA's enactment and the Community's institutions' systematic implementation of the SEA's immutable timetable for achieving the single market. Not surprisingly, following the Community's first formal steps toward 1992, world-wide consternation arose that the Community was engineering an impregnable "Fortress Europe."⁴¹ Concerned about being excluded, several West European countries made overtures to the EC: Turkey and Austria made formal applications, Malta made inquiries. As far as the Community was concerned, no accession negotiations would be considered or undertaken prior to 1993, pending completion of the single market.⁴²

In addition to launching the 1992 program, and equally important for purposes of the instant discussion, the SEA also effectuated a number of modifications to the EEC Treaty that are directly relevant not only to the recently concluded association agreements between the EC and Poland, Hungary, and Czechoslovakia, but also to the question of whether any of the new associate countries will gain full EC membership in the foreseeable future. First, Title III of the SEA in essence incorporated the processes of European Political Cooperation ("EPC") into the terms of the EEC Treaty itself.⁴³ Inclusion within the EEC Treaty did not render EPC legally binding per se on the Member States; in contrast with the substantive provisions of the EEC Treaty,⁴⁴ the provisions of Title III were not

40. See Single European Act, *supra* note 3.

41. Robert M. Jarvis, *American Business and the Single European Act: Scaling the Walls of "Fortress Europe,"* 20 CAL. W. INT'L L.J. 227, 230 (1990).

42. Charles Grant, *An Expanding Universe: Twelve or Twenty-Four*, *ECONOMIST*, July 7, 1990, at 12.

43. See Single European Act, *supra* note 3, tit. III.

44. Glaesner, *supra* note 37, at 451. Mr. Glaesner noted that

[t]he adoption of Title III dealing with European political cooperation entails no amendment to the Community Treaties. Title III is not subject to that part of the procedure governed by Community law under Article 236. Above all, Articles 3, 31, and 32 of the Single Act specify that Title III should not be integrated into the Community legal order. The juxtaposition of the texts amending the Community Treaties and the texts on Euro-

enforceable by the Court of Justice.⁴⁵ Title III indicated that the various proposals for closer political union, which surfaced with logical regularity, ultimately would be addressed. Subsequent, albeit gradual, movement toward monetary union commenced with the introduction of the European Monetary System in 1984.⁴⁶ Not until the end of 1991 in Maastricht, the Netherlands, was a landmark agreement reached on a new Treaty on European Union (the "TEU")⁴⁷ intended to facilitate the Community's increasing international responsibilities.⁴⁸ The proposed TEU establishes the parameters for a common foreign and security policy and introduces majority voting in areas that now require unanimity.⁴⁹ By the end of this century, EC Member States would have a single currency, the ECU, managed by an independent central bank, and a single joint voice in international and world affairs.⁵⁰ The TEU, signed in February 1992, provides the framework for political and monetary union, a common security and defense, and is to become effective following ratification by the twelve Member States. Denmark's recent rejection of the treaty by popular referendum⁵¹ casts some doubt on the future of the TEU in its present version. Foreign ministers of the eleven other Member States determined to press on with the ratification process; on the national level, France and Germany similarly vowed to

pean political cooperation was a purely political act that led to the instrument acquiring the name "Single Act."

Id.

45. See Note, *supra* note 32, at 1071.

46. The European Monetary System introduced the European Currency Unit ("ECU"), which is based on a "basket" of EC national currencies and is utilized for all EC financial transactions. See WINTER, *supra* note 39, at 10.

47. Treaty on European Unity, [1992] 1 C.M.L.R. 719 [hereinafter TEU], reprinted in 31 I.L.M. 253 (1992).

48. Speech by Mr. Peter Schmidhuber to the CEPS (Center for European Policy Studies)—Brussels, 4 February 1992: *The Future Financing of Europe*, RAPID, Feb. 4, 1992, available in LEXIS, Europe Library, ALLEUR File; Paul Taylor, *EC Heads Agree New Union Treaty in Marathon Talks*, Reuters, Dec. 11, 1991, available in, LEXIS, Nexis Library, OMNI File.

49. Robert J. Wielaard, *European Community Nations Sign Landmark Union Treaty*, AP, Feb. 7, 1992, available in LEXIS, Nexis Library, OMNI File.

50. Monetary union will be introduced as early as 1997, and at the latest in 1999, if at least seven Member States meet strict economic criteria. Taylor, *supra* note 48.

51. Craig R. Whitney, *Danes Reject European Union Treaty by Slim Margin*, N.Y. TIMES, June 3, 1992, at A3. A second Danish referendum is to be held in late 1993. *The World This Week: Politics and Current Affairs*, ECONOMIST, Jan. 30, 1993, at 4.

continue without Denmark.⁵² In fact, the lengthening queue of prospective members that appear willing to accept the terms of the TEU on its face that may enable the agreement to come ultimately to fruition.⁵³

The SEA significantly expanded the powers of the European Parliament in several of the Community's vital decision-making processes. Inter alia, the SEA altered both the EEC Treaty's erstwhile legal mechanisms governing the conclusion of association agreements between the Community and third countries and the "vetting" process under which otherwise qualified non-member European countries could accede to the EC. While falling far short of the increased legislative and other powers sought by the European Parliament,⁵⁴ the SEA vested in the Parliament the power of co-decision with regard to both any new agreements of association entered into by the Community (under Article 238) and any future accessions to the Community (under Article 237).⁵⁵ These amendments, in turn, were interpreted by the European Parliament as a mandate to involve itself in the Community's foreign policy.⁵⁶ As a result, insofar as all current candidates for EC membership are concerned, the rules governing the mechanics of accession are untested but may prove to be "of great political importance."⁵⁷ Consistent with the EC's continuing refusal to consider expansion prior to 1993, more than six years have transpired since the most recent expansion of the EC, the 1986 accession of Portugal and Spain as the eleventh and twelfth members of the EC.⁵⁸ Future accessions will be pursuant to the amended EEC

52. Ian Davidson, *France and Germany Back EC Expansion*, FIN. TIMES, May 23, 1992, at 2; Mark Nelson, *EC Ministers Plan to Press Ahead With Union Treaty*, WALL ST. J., June 5, 1992, at A7.

53. Julian M. Isherwood, *Danes Reject European Integration Treaty, Could Face Economic Isolation*, UPI, June 2, 1992, available in, LEXIS, Nexis Library, OMNI File.

54. See generally Elles, *supra* note 35.

55. EEC Treaty, *supra* note 1, arts. 237-38. Article 8 of the SEA amended Article 237 of the EEC Treaty to require the European Parliament's assent "by absolute majority." *Id.*

56. See Elles, *supra* note 35.

57. Glaesner, *supra* note 37, at 465 (stating that "[i]t suffices to consider the recurring discussion of Turkish accession to the Community. Parliament will certainly be called upon to participate in the conclusion of association agreements").

58. The first expansion of the Community was in 1973 when Denmark, Greenland, Ireland, and the United Kingdom acceded. Greenland resigned its membership in 1983 in a dispute over fishing policies.

Treaty provisions.

D. The Road to the Europe Agreements via the Shifting Tectonic Plates of Eastern Europe

By mid-1989, signals of burgeoning economic and political reforms in Poland and Hungary were being received and evaluated in the West. In Poland, the historic "Round Table Talks" between representatives of the Solidarity movement and the communist regime⁵⁹ were leading to the progressive ouster of the latter as the former gradually assumed power and announced plans for a market economy.⁶⁰

While it was clear that Hungary and Poland were successfully leading the way to political pluralism,⁶¹ the West had a very real fear of an influx of tens of thousands of political refugees, should law and order break down. The West's major concern, that the nascent democracies should develop peacefully,⁶² seemed best assured by an infusion of monetary aid.⁶³ The traditions of the Marshall Plan were thus carried on by its beneficiaries.

U.S. President George Bush visited Warsaw in early July 1989 and pledged American aid and credits.⁶⁴ Following his visit, he attended the "Paris Summit" of seven leading indus-

59. *European Update: Doing Business in Poland*, Eurupdate Database, 1991 WL 11687 (Nov. 6, 1992). "In 1989 the wretched state of the economy and growing political pressure finally forced the communist government to begin talks with the opposition." *Id.* at *15.

60. Bronislaw Geremek, *Postcommunism and Democracy in Poland*, 13 WASH. Q. 125 (1990).

61. Zbigniew Brzezinski, *Ending the Cold War*, 12 WASH. Q. 27 (1989) [hereinafter Z. Brzezinski].

62. *Id.*

63. *Id.* Mr. Brzezinski noted that

[w]ithout substantial Western aid, the process of change, notably in Hungary and Poland and soon in Czechoslovakia, could simply provoke breakdowns, even revolutionary outbreaks, then repressive reactions and even belated Soviet intervention. That would have terminal consequences for any genuine democratization. Therefore, the West must unambiguously convey that it holds the view that violent change in Eastern Europe would be counterproductive from everyone's point of view.

Id.

64. U.S. aid outlined for Poland included a State US\$100,000,000 Polish American Enterprise Fund; a pledge of support for Poland to obtain a US\$325,000,000 World Bank Loan; and US\$15,000,000 for environmental cleanup. *Chronology 1989*, 69 FOREIGN AFF. 213, 230 (Peter Hayes ed., America & the World 1989-1990)

trialized nations⁶⁵ where the nations determined that Western aid should be funneled to Poland and Hungary to encourage further reforms and to set an example for the remaining Soviet "satellites" contemplating similar reforms.⁶⁶ Because "no one could yet be sure that Moscow had not drawn a line beyond which it would intervene,"⁶⁷ such aid was initially limited in size and scope. The Paris Summit participants assigned the EC the responsibility for coordinating the Western aid programs. In doing so, the Western nations set in motion one of the principal aspects of the current convergence.

The need for coordination of the limited Western help likely to be available became evident. It made sense to assign the role to the EC Commission. Few realized then that this would become the basis for a major political decision about how to proceed with a profound reorganization of Europe.⁶⁸

The EC Commission coordinated both the funds and the technical support, as part and on behalf of a group that expanded to include twenty-four industrial nations,⁶⁹ and it engaged in substantial aid activities of its own.⁷⁰ The Commission unmistakably wielded both "classic" foreign policy tools and incentives, such as development aid, as well as "newer tactics such as trade liberalization measures . . . and debt relief"⁷¹ to propel Eastern Europe toward further democratic change. The cumulative effect of these wide-ranging measures paved the way for Poland, Hungary, and Czechoslovakia to enter into the Europe Agreements that were concluded in December 1991.

65. The United States, Japan, Canada, Germany, France, Italy, and the United Kingdom attended the Paris Summit.

66. Lewis, *supra* note 38.

67. *Id.*

68. *Id.*

69. Bruce Barnard, *Czechoslovakia Hopes to be EC Member by 2000*, J. COMM., Mar. 1991, at A3.

70. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2405 (1991). Professor Weiler commented on the EC's role:

Notice how naturally the Member States and their Western allies have turned to the Community to take the lead role in assisting the development and reconstruction of Eastern Europe. A mere decade or two ago, such an overt foreign policy posture for the Community would have been bitterly contested by its very own Member States.

Id.

71. Note, *supra* note 32, at 1077.

Even more importantly, in effect anticipating the Community's later accords in Maastricht,⁷² the EC's international coordination activities produced an entirely new phenomenon. The allegedly separate spheres of European Political Cooperation and issues heretofore exclusively within the competence of the European Economic Community converged:

The need to co-ordinate economic and political strategies for Eastern Europe has led to a *blurring of the EC-EPC distinction*. Normally the officials from national capitals who run EPC would seldom meet the officials that countries keep in Brussels to manage EC business. But over the past year the two groups have met frequently to talk about Eastern Europe.⁷³

Certain commentators credit the EC Commission with this development that the Commission subsequently maximized by assuming the role of mediator between East and West, ultimately strengthening its own position within the Community power structure.⁷⁴

The EC's prominent role in promoting change in Eastern Europe and its assumption of regional responsibility soon placed it in the position of confronting the fact that, in the eyes of the "Europeans" of the East, the EC had in effect arrogated unto itself the connotation that "Europe" was synonymous with the Community when, in fact, many newly emancipated

72. William Drozdiak, *Differences Over Form of a United Europe Remain as Crucial Dec. 9 Summit Nears*, WASH. POST, Nov. 22, 1991, at A40. Mr. Drozdiak noted that [a]s they confront the prospect of a European Community that could swell to two dozen members or more in coming years, EC leaders realize that the decisions at Maastricht will be the last chance to establish a basis to construct a United States of Europe, or see the Community devolve into a diffuse collection of states that form little more than a trading bloc.

Id.

73. *An Expanding Universe; In Need of a Face-lift*, ECONOMIST, July 7, 1990, at 30 (emphasis added).

74. Sadurska, *supra* note 12, at 2508-09 (stating that "[c]redit for this evolution should go largely to the Commission, which, with the blessing of some national governments, seized the opportunity to blur division lines between the Community's and the European Political Cooperation's decision making in the policy and administration of assistance to Central and Eastern Europe"). Professor Weiler notes that "[t]he European Commission now plays a central role in dictating the Community agenda and in shaping the content of its policy and norms." Weiler, *supra* note 70, at 2406. Although it is too early to tell, perhaps the Danes' recently expressed distrust of the huge EC bureaucracy is at least partly a result of the Commission having overplayed its hand?

countries were now claiming entitlement to recognition as members of Europe.⁷⁵ The Community increasingly was pressed to address the fledgling democracies' expressed wish for EC admission, or at least for some type of formalized partnership. Claims from East Europe arose at a period in time when the Community had consistently held off all applicants on the ground that it would not consider expansion until after the completion of its 1992 program. Moreover, under the EEC Treaty, the EC's options were limited. Only two forms of legal relationships with the EC have been utilized successfully to date: full membership status and "associate status."⁷⁶ Associate status basically endows the associated country with free trade benefits in certain defined areas.

In the latter part of 1991, the swift unraveling of the remaining communist regimes in the East, the dismantling of the Council of Mutual Economic Assistance ("COMECON"),⁷⁷ and the evaporation of the Soviet Union gave rise to the present, still-developing, reconfiguration of the European landscape in which the EC is the pivotal institutional survivor of a previously bi-polarized European continent. The seriatim disintegration of the Eastern European bloc as a unified economic and political power heretofore centered around the once-formidable Soviet Union starkly contrasts with the EC's firm and steady march toward full economic integration and its movement toward political and monetary union. This disintegration placed the EC in a leadership position in the industrialized world's efforts to deal with the rapid developments in Eastern Europe. With no option but to reevaluate the future architecture of Europe, industrialized nations focused on the Commu-

75. Sadurska, *supra* note 12, at 2502 ("[T]he . . . democratic revolutions of Central and Eastern Europe brought to light the fallacy of viewing 'Europe' as limited to the European Community The appropriation of the name was not geographically, historically, or culturally justified."); Weiler, *supra* note 70, at 2406 (stating that "[i]n public discourse, 'Europe' increasingly means the European Community in much the same way that 'America' means the United States").

76. See *infra* notes 163-74 and accompanying text (discussing European Economic Area).

77. Charter of the Council of Mutual Economic Assistance, Dec. 14, 1959, 368 U.N.T.S. 253 [hereinafter COMECON]. Also known as CMEA, COMECON was an economic and trade organization that included the U.S.S.R., Bulgaria, Czechoslovakia, the German Democratic Republic, Poland, Romania, Cuba, Mongolia, and Vietnam.

nity.⁷⁸ The Community, in turn, recognized that the progressive strengthening of political cooperation not only facilitated its shouldering of continent-wide responsibilities but also rendered the EC's political and economic model increasingly attractive to non-member countries in the process.⁷⁹ Community leaders, "acutely aware of democracy's fragility" and its own unsuccessful efforts at mediating a peaceful resolution to the shooting war in Yugoslavia, became even more firmly convinced that political union was desperately needed.⁸⁰

II. THE CASE OF POLAND

In negotiating the recent "Europe" Association Agreements, the EC dealt separately, albeit in a closely parallel fashion, with Poland, Hungary, and Czechoslovakia,⁸¹ countries in which "capitalist, free market traditions are rooted"⁸² and which first initiated reforms. Consistent with the EEC Treaty's legal framework, any future Community negotiations concerning accession will be on an individual, country-by-country basis. The Community presumably chose to deal with Poland, Hungary, and Czechoslovakia concurrently because these three countries have, in the past several years, experienced roughly similar economic and political travails while contemporaneously attempting to shake off the debris of some forty years of ineffective Marxist-Leninist regimes. By the beginning of this decade, all three had embraced the concept of free enterprise, created parliamentary institutions, and established freedom of the press and religion.⁸³ Each, however, is a discrete nation, the product of centuries, and in the case of Poland, a millennium, of distinct political, cultural, religious, and economic traditions.⁸⁴ Poland's conversion to Christianity in

78. Jan Zielonka, *East Central Europe: Democracy in Retreat*, 14 WASH. Q. 107 (1991); Krause & Schmidt, *supra* note 23.

79. See *European Commission's Work Programme for 1990*, Eur. Rep., Jan. 27, 1990, available in LEXIS, Europe Library, ALLEUR File.

80. Malgorzata Bos-Karczewska, *Building a New Europe*, RZECZPOSPOLITA, No. 289, Dec. 12, 1991, at 3.

81. Commission Press Release, IP (91) 1033 (Dec. 23, 1990); see *Europe Agreements*, *supra* note 10.

82. Adlai E. Stevenson & Alton Frye, *Trading With the Communists*, 68 FOREIGN AFF. 53, 63 (Spring 1989).

83. Gati, *supra* note 4, at 130.

84. *Id.*

966 A.D. marked the beginning of 1000 years of Polish association with the West and its role as "the eastern outpost of Western culture."⁸⁵ Today's Poland is a uniquely homogeneous country as compared to its neighbors; it is almost completely ethnically, linguistically, and religiously uniform.⁸⁶

Poland was the first of the East Central European countries to reintroduce democracy and to stimulate a market-oriented economy forcibly. "Shock policies" were introduced to ensure the transition as the Polish government "applied a surgical knife to the economy."⁸⁷ This was the first attempt in history at creating a market out of a mismanaged economy. Unlike Spain and Portugal, which in the 1970s underwent radical political transformation, Poland did not have the benefit of inheriting a weak private economy.⁸⁸

Transition to a market economy from a socialist one is an undertaking of vast proportions. Several principal characteristics are recognized by the West as barometers of progress in this direction. The first is "currency convertibility." This involves making the national currency convertible into western currencies so that commercial transactions can be handled in a manner equivalent to that in the West. The second characteristic requires eliminating government subsidies and allowing prices to adjust rationally. Third, an appropriate legal framework must be erected to ensure a sound banking and financial system and free competition on the market. Fourth, inefficient and uncompetitive state-owned factories and enterprises must be privatized to stimulate growth and modernization. Privatization, of course, calls for a significant influx of capital investment which, in a bankrupt economy such as Poland's, is nonexistent; hence, there is an urgent need for foreign capital infusions and foreign investment. Western economists consider that currency convertibility is well-advanced in Poland's reforming economy.⁸⁹ Other countries in the region are follow-

85. Wenceslaus J. Wagner, *Introduction to POLISH LAW THROUGHOUT THE AGES: 1,000 YEARS OF LEGAL THOUGHT IN POLAND 2* (Wenceslaus J. Wagner ed., 1970) [hereinafter *POLISH LAW THROUGHOUT THE AGES*].

86. See NORMAN DAVIS, *HEART OF EUROPE: A SHORT HISTORY OF POLAND* (1985). This current homogeneity is due to the revamping of Poland's eastern and western territorial borders after World War II. *Id.*

87. Gati, *supra* note 4, at 129-30.

88. *Id.*

89. See generally MERRITT, *supra* note 14.

ing closely in the footsteps of Poland's "trail-blazing liberalization of its foreign exchange market."⁹⁰

The road Poland followed to the successful ouster of communism lasted several decades and, in its early stages, provoked violence and bloodshed.⁹¹ In its last phase, Poland's transition was unique and consistently has served as a model for other former Soviet satellite countries in the region. Today's Poland, a nation of 38,300,000 people⁹² situated between a recently reunified Germany and the even more recently reconstituted states of Lithuania and Ukraine, expounds a clear vision of its own future role in the new European architecture. Political leaders of the new Poland have repeatedly articulated their country's intent to become a full member of the European Community and to play a political role in the central portion of Europe.⁹³ While the exact means for attaining this ambitious vision are less than obvious, the West should keep in mind that Poland is a country acutely aware of its centuries of legal and democratic traditions and considers the present as primarily a continuation of the past. Longtime political dissident and more recent Parliamentary figure Bronislaw Geremek stresses that in view of Poland's "significant democratic tradition and a working knowledge of democratic institutions—as well as a strong public preference for democracy," the political transition is more a return to the country's preexisting democratic roots and is the very reason for its placement of the market economy at the top of national priorities.⁹⁴

90. Anthony Robinson, *Poland Sets the Pattern—Eastern Europe's Move Towards Convertible Currencies*, *FIN. TIMES*, May 29, 1992, at 4.

91. See, e.g., JOHN MOODY & ROBERT BOYES, *THE PRIEST AND THE POLICEMAN: THE COURAGEOUS LIFE AND CRUEL MURDER OF FATHER JERZY POPIELUSZKO* (1987). Some examples of such bloodshed are the firing at workers protesting price hikes in 1970, the imposition of martial law on December 13, 1981, and the killing of Father Popieluszko by the state's security apparatus. *Id.*

92. *Poland*, *EASTERN EUROPEAN BUSINESS & INVESTMENT GUIDES*, Sept. 24, 1992, available in LEXIS, Europe Library, EEBIG File. Czechoslovakia has a population of 15,700,000 and Hungary has a population of 10,550,000. *Id.*

93. *We Must Mobilize Forces Anew*, PAP News Wire, Dec. 21, 1991, available in LEXIS, Nexis Library, OMNI File.

94. Geremek, *supra* note 60, at 126. Mr. Geremek points out that this tradition explains the abandonment by the communist regime, in 1956, of the forced collectivization of agricultural property in Poland and the ensuing private agricultural activity there in the following three decades. *Id.*

Mr. Geremek explains that, in effectuating Poland's democratic revolution, its leaders have followed a three-part strategy: 1) building a civil society (i.e., awakening

The Poles' repeated insistence, as of early 1990, on eventual admission to the European Community represents a natural extension of the process of reclaiming their Western European heritage. Certain EC officials found this appeal not only to be presumptuous, but it initially left Commission President Jacques Delors "unmoved."⁹⁵ For all three Visegrad nations, movement toward the EC is the very symbol of the termination of the post-Yalta reality.⁹⁶ The popular perception that economic welfare exists in tandem with a stable democratic system, as evidenced, inter alia, by Western Europe, the United States, and Canada, is another factor.⁹⁷ Firm evidence of the EC's recognition of these countries' geographical and cultural proximity to Western Europe is another aspect.⁹⁸ Other forces play a role as well, and are crucial to understanding the context of the Europe Agreements.

A. Legal Framework of Poland's Pre-1990 Trade Relations with the European Community

As formulated in December 1991, the Europe Agreement entered into between Poland and the EC⁹⁹ is not solely the product of newly articulated political objectives on either side; the economic bases of the Europe Agreement are an outgrowth of the preexisting Trade and Cooperation Agreement between Poland and the Community.¹⁰⁰ The phrase "Trade and Cooperation Agreement" is a generic one in the context of Community external relations. Since the 1960s, pursuant to Article 113 of the EEC Treaty, the Community has entered into many such accords on a worldwide basis with countries such as Argentina and India.¹⁰¹ These in turn gradually

the populace from the apathy and conformity of the totalitarian regime), 2) rejecting violent revolution, and 3) pursuing a mixed economy. *Id.*

95. Grant, *supra* note 42.

96. *Czechoslovakia-Hungary-Poland Sign Association Agreements with EC*, BBC, Summary of World Broadcasts, Dec. 18, 1991, at EE/1258/A1/1, available in LEXIS, Nexis Library, OMNI File.

97. Zielonka, *supra* note 78.

98. *EEC/Eastern Europe: Commission Prepares Talks on Closer Cooperation*, Eur. Rep., No. 1578, Apr. 12, 1990, at 8, available in LEXIS, Europe Library, ALLEUR File.

99. See Europe Agreements, *supra* note 10.

100. Council Decision No. 88/593, O.J. L 339/1 (1989) (conclusion of agreement between EC and Polish People's Republic on trade, commercial, and economic cooperation).

101. EEC Treaty, *supra* note 1, art. 113. The Community has entered into trade

evolved as a tool of the Community's foreign policy.¹⁰²

It is essential to keep in mind that one of the focal points of the EC's commercial dealings with third countries has been its Common Agricultural Policy ("CAP"), mandated by Article 3 of the EEC Treaty.¹⁰³ Other than laying down general principles, the EEC Treaty itself says little about how to achieve the policy.¹⁰⁴ The CAP therefore was constructed in the early 1960s¹⁰⁵ according to the particularized needs of several of the EC's founding members, most notably France, which had a sizeable agrarian sector in need of support.¹⁰⁶ Community scholars point out that had Great Britain, for example, been one of the founding members of the EC, the structure and priorities of the CAP undoubtedly would have been vastly different.¹⁰⁷ Thirty years later, the CAP has become the EC's most expensive program. Because it retains many of its original biases, it has become a very major hurdle in the EC's trade relations under the General Agreement on Tariffs and Trade ("GATT").¹⁰⁸ While the current conventional wisdom is that the GATT Uruguay Round may in the foreseeable future force some changes to the CAP, historically the EC has conducted its trade relations and resulting international agreements so as to protect the CAP. At present, Community officials appear in-

agreements with Israel, Argentina, the ASEAN community, Bangladesh, Brazil, Canada, China, Czechoslovakia, Poland, Hungary, India, Mexico, Pakistan, Romania, Sri Lanka, Uruguay, and Yugoslavia.

102. The European Parliament, for example, has not been vested with any role in connection with the conclusion of such agreements.

103. EEC Treaty, *supra* note 1, art. 3. Article 40 of the EEC Treaty sets forth how the Community is to establish a common agricultural policy. *Id.* art. 40. The EEC Treaty also establishes the objectives of the common agricultural policy. *Id.* art. 39(1).

104. EEC Treaty, *supra* note 1, art. 39. The EEC Treaty calls for a fair standard of living for the agricultural community, that markets should be stabilized, and delivery of supplies should be guaranteed at reasonable prices. *Id.* As Mr. Thompson noted in 1966 "this will be, of course, a paradise for all, not only for the farmers, but also for the consumer." Thompson, *supra* note 22, at 396.

105. The first CAP-related regulations were enacted by the Council in January, 1962. Thompson, *supra* note 22, at 400.

106. *Id.* at 339 (stating that "[a]gricultural policy has always been of extreme interest to the French, and for this reason the Community has made a great effort to comply with French desires by pushing forward the agricultural policy as fast as possible").

107. Dagoglou, *supra* note 15, at 150.

108. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pts. (5) & (6), 55 U.N.T.S. 188 [hereinafter GATT].

creasingly aware that the CAP cannot continue to take up more than one half of its budget when other vitally important sectors such as the environment, energy, transport, and foreign policy are relegated to sharing a fraction of that amount.¹⁰⁹

The genesis of the 1989 Trade and Cooperation Agreement with Poland had its roots in the bipolarization of Europe after 1946. Prior to World War II, Poland's international trade was primarily with the discrete nations of Western Europe. Following the war and the Yalta Accords, Poland became part of the Soviet trading bloc and a party to highly asymmetrical trading arrangements with the Soviet Union.¹¹⁰ Along with the other satellite countries, Poland was a member of the Soviet-sponsored COMECON,¹¹¹ an organization created by the U.S.S.R. as a counterweight to the EC.¹¹² Relations between COMECON and the EC were characterized by many years of hostility during which each grouping refused to recognize the other's legal capacity to enter into trade agreements on behalf of its respective Member States, as the EC routinely did pursuant to its expanding Common Commercial Policy.¹¹³

As a result of Mikhail Gorbachev's outreach activities to the West, the EC in 1988 already was acting to broaden trade and economic ties with the COMECON countries and to establish political ties as well.¹¹⁴ Legal posturing ended in June 1988 when COMECON and the EC issued a Joint Declaration establishing official trade relations and plans for economic co-

109. See Address by Mr. Ray Mac Sharry at the Sligo County Council Conference—4 and 5 May 1992, RAPID, May 4, 1992, available in LEXIS, Europe Library, ALLEUR File.

110. Kazimierz Grzybowski, *The Council for Mutual Economic Assistance and the European Community*, 84 AM. J. INT'L L. 284 (1990).

111. COMECON, *supra* note 77 (associating the USSR, Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, and Romania with Mongolia, Vietnam, and Cuba).

112. Grzybowski, *supra* note 110.

113. EEC Treaty, *supra* note 1, art. 113. As an exception to the general rule that only the Community could execute international agreements in furtherance of its Common Commercial Policy, the EEC Treaty initially allowed the Member States to conclude bilateral trade treaties with Eastern European countries until 1973, when this authorization expired.

Conversely, COMECON was not vested with legal treaty-making powers, and it steadfastly refused to recognize that the Member States of the Community had in fact surrendered their sovereign powers to the EC in this regard. Thus ensued 15 years of lengthy negotiations between the EC on the one hand, and COMECON and each of its Member States on the other hand. Grzybowski, *supra* note 110.

114. Grzybowski, *supra* note 110.

operation in areas of common interest.¹¹⁵ Exactly three years later, COMECON itself ceased to exist.¹¹⁶

Concurrent with its COMECON negotiations that ultimately led to the Joint Declaration, the Community conducted bilateral negotiations with several countries, including Hungary and Poland, aimed at reaching trade agreements.¹¹⁷ Substantial trading activity was ongoing with these two countries as evidenced by the fact that in 1988 the EC was absorbing nearly one third of Poland's exports.¹¹⁸ In October 1989, a Trade and Cooperation Agreement was concluded between the EC and Poland;¹¹⁹ a similar agreement had been reached with Hungary.¹²⁰ Typically such trade agreements are intended to provide the signatory with additional access to EC markets by eliminating certain quantitative restrictions and quotas on exports to the EC.¹²¹

Initially, the new association agreements, including the 1992 Europe Agreements between the EC and Poland, Czechoslovakia, and Hungary,¹²² were proposed by the Community primarily as "second generation" accords—a replacement for and significant upgrade of the already existing "first genera-

115. 32 O.J. L 137 (1988); see *Chronology 1989*, *supra* note 64.

116. COMECON was dissolved in July 1991.

117. The EC was also negotiating with East Germany, Czechoslovakia, Bulgaria, Romania, and the U.S.S.R. The agreements were generally similar and covered all goods within the EC's competence. Thus the agreements did not include coal, which was within the competence of the ECSC and was thus "for the Community, a neat way of placing off-limits its special regime for steel and its protection against Polish coal." JOHN PINDER, *THE EUROPEAN COMMUNITY AND EASTERN EUROPE* 26 (1991).

118. In 1988, the EC absorbed 23% of Hungary's exports, 24% of Czechoslovakia's, and a full 30% of Poland's exports. Eva Kaluzynska, *Poland, Czechoslovakia, Hungary Sign Accords With EC*, Reuter Lib. Rep., Dec. 16, 1991, available in LEXIS, Nexis Library, OMNI File.

119. Council Decision No. 88/595, O.J. L 327/1 (1988) (concluding agreement between EC and Hungarian People's Republic on trade and commercial economic cooperation).

120. Council Decision No. 88/593 O.J. L 339/1 (1989) (concluding agreement between EC and Polish People's Republic on trade, commercial, and economic cooperation).

121. PINDER, *supra* note 117, at 26-27. The agreement with Poland provided for certain reductions of tariffs and levies on agricultural goods in return for certain reciprocal tariff reductions. As with Czechoslovakia, specific quotas on textiles, steel, and agricultural products were to end in 1994. *Id.* Because Hungary at that time had achieved fewer political and economic reforms, the parallel agreement with Hungary set the later date of 1995. *Id.* at 27.

122. See *Europe Agreements*, *supra* note 10.

tion" trade and cooperation agreements.¹²³ While it is clear that the very existence of the Europe Agreements is directly attributable to the East Central European countries' political evolution along lines compatible with those of the Western democracies, much of the trade-related substance of the Europe Agreement with Poland is a logical outgrowth of the 1989 Trade and Cooperation Agreement¹²⁴ in which barriers to trade between the EC and Poland were first identified and addressed.

B. Legal Framework of EC Aid to Poland

In 1989, when Western nations first commenced pouring foreign aid into East Central Europe, one of the Community's many contributions was to accelerate the lifting of a variety of quantitative restrictions on Polish exports to the Community well ahead of the deadlines laid down in the 1989 Trade and Cooperation Agreement with Poland. The EC Council acted to liberalize trade further.¹²⁵ The Council extended to Poland, as well as to Czechoslovakia and Hungary, the schedule of tariff cuts set forth in the EC's Generalized System of Preferences, normally offered to third world countries, and eliminated or suspended quantitative restrictions on trade as of January, 1990 to all member countries except Portugal and Spain.¹²⁶ Textiles, steel, and coal were not covered by the quota suspension.¹²⁷ The immediate effect of the EC's action was to provide Poland with increased access to EC markets for its farm produce.¹²⁸

The EC aid directed at Poland falls into both "microeconomic" and "macroeconomic" categories.¹²⁹

123. Kaluzynska, *supra* note 118; see *supra* notes 100, 120 and accompanying text (citing "first generation" accords).

124. Kaluzynska, *supra* note 118.

125. See Council Regulation No. 3381/89, O.J. L 326/6 (1989) (liberalizing quantitative restrictions with regard to Poland and Hungary); Council Regulation No. 3692/89, O.J. L 362/1 (1989) (suspending quantitative restrictions in respect to Poland and Hungary).

126. See Kaluzynska, *supra* note 118.

127. *Id.*

128. See MERRITT, *supra* note 14, at 40. Subsequently, the EC extended these benefits to Bulgaria, Romania, Albania, and the Baltic States. *EEC/Eastern Europe Relations*, RAPID, May 21, 1992 available in LEXIS, Europe Library, ALLEUR File.

129. MERRITT, *supra* note 14, at 72.

Microeconomic aid has been dispensed primarily within the parameters of the PHARE program¹³⁰—one of the principal mechanisms devised by the Community to evidence support for Polish and Hungarian economic restructuring.¹³¹ “Macroeconomic” assistance has generally taken the form of funds donated by the G-24 under terms and conditions dictated by the International Monetary Fund (the “IMF”) and the World Bank.

1. Microeconomic Aid: The PHARE Program

The PHARE program targeted five principal areas of activity: restructuring the agricultural sector, increasing access to Western markets, promoting investment, protecting the environment, and increasing professional training opportunities.¹³² “All Community PHARE funding is in the form of non-reimbursable grants to the beneficiary governments.”¹³³ To date, some twenty-seven projects have been approved for Poland at a cost of ECU380,000,000; their principal focus has been economic restructuring, the development of small firms, and human resources.¹³⁴ The EC Commission administers and monitors PHARE to ensure that efforts under PHARE parallel other Western aid efforts.¹³⁵ The list of beneficiaries of PHARE has expanded to include the CSFR, Bulgaria, Romania, the Baltic States, and Yugoslavia (currently blocked)

130. PHARE in the English language connotes “beacon of light.” The acronym itself is French and stems from *Pologne, Hongrie: aide à la restructuration économique*. See *id.* at 73.

131. See Council Regulation No. 1360/90, O.J. L 131/1 (1990) establishing a European Training Foundation to provide job training, and where appropriate, re-training for young people and adults. *Id.* The PHARE program had certain eligibility criteria that at that time could only be met by Poland and Hungary. Professor Sadurska lists these requirements as commitment to the rule of law and human rights, free multi-party elections, and economic activity geared to a free market. Sadurska, *supra* note 12, at 2504 n.12. Subsequently, PHARE was extended to Bulgaria, Czechoslovakia, Romania, and Yugoslavia. *Id.*

132. Council Regulation No. 1360/90, O.J. L 131/1 (1990).

133. *EEC/Eastern Europe Relations*, *supra* note 128, at 2.

134. *Id.* Economic restructuring under these programs targets the environment, agriculture, industrial, financial, social, and health sectors.

135. A committee on aid for economic restructuring in Poland and Hungary was established at the Commission pursuant to Council Regulation No. 3906, O.J. L 375 (1989). When dealing with aid questions involving the European Investment Bank, a representative of the latter is to participate in such proceedings. See *infra* notes 147-49 and accompanying text (discussing the European Investment Bank).

with a 1992 budget of ECU1,700,000,000.¹³⁶

2. Macroeconomic Aid

The first major "macroeconomic" aid was in the form of the 1990 Polish Stabilization Fund of US\$1,000,000,000. This aid played a critical role in launching the Polish Government's economic "shock policies" by making Polish currency, the *zloty*, convertible for all domestic transactions.¹³⁷

Another major initiative to promote democratic, multi-party principles and market economics in East Central Europe was the creation of a London-based European Bank for Reconstruction and Development (the "EBRD") by the EC and forty countries.¹³⁸ Its stated purpose is "foster[ing] the transition toward open market-oriented economies and to promote private and entrepreneurial initiative" in East and Central Europe.¹³⁹ The choice of a banking mechanism was based upon the founding countries' hope that use of governmental monies to promote investment in the private sector of the new democracies, and in particular the requirement that at least sixty percent of the annual total of the EBRD's loans be made to private borrowers, would eventually induce private capital to follow suit.¹⁴⁰ Article 8 of the agreement establishing the EBRD sets out eligibility criteria for recipient countries.¹⁴¹ Recipients must be "proceeding steadily in the transition toward market oriented economies."¹⁴² Membership in the EBRD is open to European countries, the EC, non-European members of the IMF, and the European Investment Bank (the "EIB").¹⁴³ Working in cooperation with the IMF, the World Bank, the Organization for Economic Cooperation and Development (the

136. *EEC/Eastern Europe Relations*, *supra* note 128.

137. MERRITT, *supra* note 14, at 72. See text accompanying notes 87-89 (discussing Poland's "shock policy" and current convertibility).

138. *European Bank for Reconstruction and Development: Agreement Establishing*, 29 I.L.M. 1077 (1990) [hereinafter Bank Agreement]. Initial capital was set at ECU10,000,000,000 and initial subscriptions to the authorized stock were allocated among prospective members. *Id.* at 1078. For example, the EC's allotment was 22,800 shares at ECU228,000,000; the U.S., 100,000 shares at ECU1,000,000,000; France and Germany, 85,175 shares each at ECU851,750,000. *Id.* at 1102-03.

139. *Id.* at 1084.

140. PINDER, *supra* note 117, at 87.

141. Bank Agreement, *supra* note 138, at 1086-87.

142. *Id.* at 1086.

143. *Id.* at 1078.

"OECD"), and other organizations, the EBRD's functions include mobilizing capital and management, as well as providing technical assistance in promoting private investment and privatization.¹⁴⁴ Most recently, the EBRD has expanded its activities to include pledging funds to assist Poland's privatization program, rebuilding the regional trade that collapsed with COMECON, and assisting fledgling banking sectors in identifying and avoiding international money laundering schemes.¹⁴⁵ The EBRD has for the first time brought in commercial banks as participants on a US\$60,000,000 loan to Polska Telefonia Komorkowa, a joint venture between Western and Polish firms. The loan has been syndicated to four European banks who have been granted "preferred creditor status," and it reflects EBRD's strategy of financing joint ventures having Western European partners to stimulate increased investment.¹⁴⁶

The EIB, a separate legal entity created pursuant to Article 3 of the EEC Treaty,¹⁴⁷ serves as the Community's banking "arm." Although its primary function is to provide grants and loans for intra-Community regional development and industrial modernization, its authority to issue loans to non-Member States has involved it extensively with countries with which the Community has association agreements. The EIB's interplay with the PHARE program has involved the promotion of private investment and financial assistance to small firms. The Council granted the EIB a guarantee "against losses for loans for projects in Poland and Hungary."¹⁴⁸ The EIB's investment activities currently extend to Poland, Hungary, Czechoslovakia, Romania, and Bulgaria, with a total of ECU1,700,000,000 earmarked for loans to these five countries.¹⁴⁹

144. *Id.* art. 2; see *infra* notes 390-412 and accompanying text (discussing privatization). In June 1991, the Bank announced its first investment loan of US\$50,000,000 to a Polish bank in Poznan. MERRITT, *supra* note 14, at 132.

145. *Attali Opens New EBRD Offices in Warsaw and Budapest; ECU Loan Set*, EBRD WATCH, Mar. 16, 1992, at 3, available in LEXIS, Europe Library, EERPT File.

146. Sara Webb, *EBRD Brings Banks Into East European Lending*, FIN. TIMES, May 11, 1992, at 17.

147. EEC Treaty, *supra* note 1, art. 3. Subparagraph (j) calls for "the establishment of a European Investment Bank to facilitate the economic expansion of the Community by opening up fresh resources." *Id.*

148. Council Directive No. 90/62, O.J. L 42 (1990).

149. EEC/Eastern Europe Relations, *supra* note 128.

III. THE SIGNIFICANCE OF THE EUROPE AGREEMENTS IN THE LARGER CONTEXT OF POLAND'S ASPIRATIONS TO EC MEMBERSHIP

A. *The Legal Framework of the Community's Association Agreements in General*

The Europe Agreements (which Poland, Czechoslovakia, and Hungary are counting on to pave the way to full Community membership) constitute a form of "association" agreement specifically contemplated in Article 238 of the EEC Treaty.¹⁵⁰ Association agreements have long formed a standard part of the EC's panoply of international networking with its geographically proximate neighbors in the Mediterranean Basin and Western Europe. For example, association agreements have been concluded with Cyprus, Malta, and Turkey, (all EC hopefuls),¹⁵¹ as well as with non-European countries which, by definition, are not eligible for membership.¹⁵² Virtually identical association agreements with each of the European Free Trade Association ("EFTA") countries¹⁵³ have been in place since the early 1970s.¹⁵⁴

150. Article 238 of the EEC Treaty provides as follows:

The Community may conclude with a third State, a union of States or an international organization agreements establishing an association involving reciprocal rights and obligations, common action and special procedures. These agreements shall be concluded by the Council, acting unanimously after receiving the assent of the European Parliament which shall act by an absolute majority of its component members. Where such agreements call for amendments to this Treaty, these amendments shall first be adopted in accordance with the procedure laid down in Article 236.

EEC Treaty, *supra* note 1, art. 238. As noted above, the second paragraph is as replaced by Article 9 of the Single European Act. See Single European Act, *supra* note 3.

151. See *infra* notes 263-321 and accompanying text (discussing other EC hopefuls).

152. Association agreements exist with Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, Syria, Turkey, Switzerland, Sweden, Austria, Norway, and Finland. Israel recently indicated it wished to extend its ties to the EC yet further by becoming a member of the European Economic Area. Hugh Carnegie, *Tension Marks Israel's Talks with Community*, FIN. TIMES, May 12, 1992, at 2.

153. EFTA is the acronym for the European Free Trade Association founded in 1960. Its original members were Great Britain, Denmark, Austria, Finland, Iceland, Norway, Portugal, Sweden, and Switzerland. Subsequently, Great Britain and Denmark, and more recently Portugal, left the ranks of EFTA to join the EC.

154. The EC concluded association agreements with the current members of EFTA as follows: Austria in 1972, Finland in 1973, Iceland in 1972, Norway in 1973, Sweden in 1972, and Switzerland in 1972.

B. *An Overview of the Community's Prior Association Agreements*

Although the central objectives common to all association agreements are the creation of free trade for defined products between the individual country and the EC¹⁵⁵ and the provision of varying degrees of access to EC markets for defined agricultural products, the "political" scope of the association agreements varies widely. The association agreements of the 1960s with Cyprus and Malta were each crafted with the far-reaching goal of a progressive "customs union" with the EC, while the agreement with Turkey goes further, expressly referring to prospects of future EC membership.¹⁵⁶ The association agreements with countries with whom individual EC Member States have had close historical or political ties (for example, France with Algeria, Morocco, Tunisia, Lebanon, and Syria; and Britain with Cyprus, Egypt, and Malta) provide industrial and technical cooperation as well as financial assistance.¹⁵⁷ Pursuing a policy of "enlightened self-interest," the Community's long-standing role in fostering economic and political stability in the region, labeled "the EC's global Mediterranean policy," has assumed even greater urgency, in the Commission's view, in the wake of the 1991 Gulf War.¹⁵⁸ The EC is committed to maintaining the traditional flow of agricultural goods from its Mediterranean associates, irrespective of the accession of Spain and Portugal, whose agricultural output otherwise would be in direct competition therewith.¹⁵⁹

By far the most extensive network of agreements exists with some sixty-nine African, Caribbean, and Pacific ("ACP") countries under a series of "Lome Conventions."¹⁶⁰ Although technically cast in the form of association agreements, Lome is actually a mechanism under which the EC operates the "largest

155. Every association agreement establishes unlimited duty-free access for industrial products originating in the associate country. EC COMMISSION, EUROPE: WORLD PARTNER 27 (1991) [hereinafter EC COMMISSION].

156. Grant, *supra* note 42, at 7. Reciprocal concessions to the EC are provided for in the agreements with Turkey, Malta, Israel, and Cyprus. EC COMMISSION, *supra* note 155.

157. EC COMMISSION, *supra* note 155. Financial aid takes the form of direct grants and loans from the European Investment Bank.

158. *Id.* at 27.

159. *Id.* at 28.

160. See I. K. Minta, *The Lome Convention and the New International Economic Order*, 27 How. L.J. 953 (1984).

single aid program in the world.”¹⁶¹ The fourth Lome Convention runs from 1990 to 2000 and provides for ECU12,000,000,000 of aid to the ACP countries in the form of grants, “soft” loans, and interest-rate subsidies.

Elements common to past association agreements in which the Community is the economically dominant partner are (1) the Community’s willingness to liberalize trade on the EC side more rapidly than on the associates’ side and (2) a firmly stated commitment to specified quantities of financial aid over a stated time period.¹⁶²

C. *The European Economic Area* ¹⁶³

An important step beyond the basic concept of the association agreement, and illustrative of the Commission’s trend toward ever more innovative thinking, is the Community’s recently announced agreement with the seven EFTA nations that would provide for the creation of a European Economic Area (the “EEA”) throughout nineteen states. The EEA, scheduled to come into being this year following three years of arduous negotiations, would comprise a vast trading bloc of 380,000,000 consumers, accounting for nearly forty-five percent of world trade,¹⁶⁴ wherein goods, services, capital, and people would flow freely across international frontiers. Regulatory and legislative cohesion within the EEA will be ensured by the application, on the part of the EFTA members, of some 1500 Community rules in fields such as finance, competition, environment, social policy, and consumer protection.¹⁶⁵ The 1000-page EEA agreement excludes agriculture “mainly because Norway, Finland, and Switzerland would not expose

161. EC COMMISSION, *supra* note 155, at 28.

162. PINDER, *supra* note 117, at 70. Currently, the Community has offered extensive financial protocols for the time period 1991-1996 to most of its Mediterranean associates. *Id.*

163. The Agreement is in the draft stage only. See Dr. Gerhard Wegen, *Transnational Financial Services-Current Challenges for an Integrated Europe*, 60 FORDHAM L. REV. S91, S101 (1991). It will take effect if ratified by the parliaments of all countries involved. See *Norway Seeks Delay in EC Decision on Petroleum Directive*, FIN. TIMES, July 29, 1992.

164. EFTA, *E.C. Sign Accord for Giant Single Market*, Agence France Presse, May 2, 1992, available in LEXIS, Nexis Library, OMNI File.

165. See Sarah Lambert, *Europe’s Trade Deal Heartens EC Applicants*, INDEPENDENT, Oct. 23, 1991, at 10.

their farmers to competition.”¹⁶⁶ The affluent EFTA states have also agreed to contribute heavily to the EC’s coffers for the subsidization of the less wealthy Member States (Greece, Ireland, Portugal, and parts of Spain) in the form of ECU500,000,000 over the next five years, and will also make low-interest development loans to these countries totalling ECU1,500,000,000 (US\$2,730,000,000).¹⁶⁷

It is clear that the impetus that gave rise to the original concept and eventual outcome of an EEA is of vital concern to countries such as Poland whose placement in the queue of countries hoping for full EC membership will be affected by any perception on the part of the Community that participation in an EEA-type arrangement is the next logical step *after* association and thus a newly-devised *de facto* condition precedent to accession. Analysts generally agree that the idea of an EEA was concocted by the Community primarily to stave off what it foresaw as the EFTA countries’ inevitable bid for EC membership.¹⁶⁸ In particular, although the concept underlying the EEA was first advanced in 1985, the specific idea of an EEA as such is viewed as Commission President Jacques Delors’ brainchild of early 1989, when the EC started feeling pressure from would-be members¹⁶⁹ such as Austria.

Certain Polish analysts, notwithstanding Community disclaimers to the contrary, promptly interpreted the announcement of an EEA as yet another obstacle that would operate to delay further EC membership. Poland’s concern with the EEA is based on the awareness that the “brainchild” conceivably could undergo future rebirths in the form of parallel mechanisms to stall the Eastern European countries. At one point in September 1990, the EC hinted that Poland, Czechoslovakia, and Hungary should set their sights on eventual participation in the EEA, rather than on EC membership.¹⁷⁰ Polish officials are not tempted by allusions of EC officials such as Frans An-

166. Graham Brown, *EC, EFTA Countries Prepare for World's Biggest Single Market*, Agence France Presse, Apr. 30, 1992, available in LEXIS, Nexis Library, OMNI File. The three Nordic countries “are close to having the world’s most protected farm sectors.” *Id.*

167. *Id.*

168. See Brown *supra* note 166; Grant, *supra* note 42, at 12; Lambert, *supra* note 165, at 10.

169. Grant, *supra* note 42; Lambert, *supra* note 165.

170. MERRITT, *supra* note 14, at 40.

driessen to the possible creation of a new "affiliate" status¹⁷¹ or François Mitterand's repeated suggestions of a European "confederation" in lieu of expansion.¹⁷² Commentators noted from the outset that an EEA represents only a stopgap measure. The EFTA members of an EEA will not only be compelled to apply EC regulatory standards and legislation that they have had no input in formulating, but they will also continue to be precluded from participation in drafting and adopting future EC legislation that will impact upon them. Also, because an EEA will be a free trade zone rather than a customs union, its members will continue to handle external commercial relations with third countries. Current commentators describe an EEA as an antechamber or "a kind of half-membership of the Community."¹⁷³ It is acknowledged that the EEA is a transitional phase preceding EC membership,¹⁷⁴ a description that is increasingly apt as ever greater numbers of the EFTA states move toward EC membership.

D. Genesis of the Europe Agreement with Poland

As ultimately concluded in December 1991, the Europe Agreements represent a clear triumph from the perspective of the three East Central European signatories on the issue of eventual EC membership. The final agreements go further than originally intended by the EC Commission, insofar as they concretely recognize the possibility of eventual full acces-

171. See Andriessen *Proposes Affiliated Membership to Pave Way for New European Relationships*, 8 Int'l Trade Rep. (BNA) 624 (Apr. 24, 1991).

172. Steven P. Kramer, *The French Question*, 14 WASH. Q. 83 (1991). "Mitterand's idea of a European confederation has always been murky and has irritated the United States, which it excluded; the Germans, who thought it diverted attention from more important forums . . . and the East Europeans themselves, . . . who fear that it could be construed as an alternative to EC membership." *Id.*; see Roger Boyes, *Freedom Fighters Choose New Chains*, TIMES, Dec. 19, 1991.

Another prominent Frenchman, Jacques Attali, President of the EBRD, is currently advocating an agreement between the EC, EFTA, Eastern Europe and the European Far East, similar to the North American Free Trade Agreement. The opinion of this author is that Poland might be less than enthusiastic about being in the "Mexican" position of Mr. Attali's analogy.

173. David Buchan, *Court Gives Go-Ahead to EC-EFTA Accord*, FIN. TIMES, Apr. 13, 1992, at 3; David Buchan, *EEA Treaty to Spur Hot Debate on Bigger EC*, FIN. TIMES, May 2, 1992, at 2.

174. See Peter Ludlow, *The Maastricht Treaty and the Future of Europe*, 15 WASH. Q. 119 (1992).

sion.¹⁷⁵ The preamble to each of the Europe Agreements makes specific reference to the ultimate goal of membership of the respective new associates.¹⁷⁶

A retrospective glance at the principal points of the gradual evolution of the Commission's and especially President Delors' stance toward inclusion of an express reference to potential membership highlights the unique convergence of historic, economic, legal, and political trends discussed at the outset of this Article. It also illustrates the initial conflict between, and subsequent convergence of, major Community objectives as the EC struggled to respond to the ever greater tremors in the East. In some small measure, it may indicate how Poland's future efforts to gain admittance will unfold.

Along the route to the successful conclusion of the Europe Agreements, the EC grappled with complex factors stemming from its Common Commercial Policy,¹⁷⁷ Common Agricultural Policy,¹⁷⁸ European Political Cooperation,¹⁷⁹ increased focus on the roles of the European Parliament and the European Council, environmental concerns, security, and defense considerations—the list is far from exhaustive. These “association” agreements, arguably the most recent and far-reaching ever concluded by the EC, reflect the dynamic propelling the Community today.

The road to association was undertaken in late 1989 when the European Council,¹⁸⁰ meeting in Strasbourg, announced the Community's intent to create an “association” with those Central and Eastern European countries engaged in economic and political reform.¹⁸¹ This action was an obvious corollary to and extension of the EC Commission's foreign aid activities,

175. “Just a year ago the situation . . . was totally different: Membership of the three countries was taboo and treated as an illusion.” Bos-Karczewska, *supra* note 80.

176. *Andriessen Says EC Searching for New Approach to Former Soviet Republics*, 9 Int'l Trade Rep. (BNA) 112 (Jan. 15, 1992); see Europe Agreements, *supra* note 10.

177. See EEC Treaty, *supra* note 1, art. 113.

178. *Id.* art. 40.

179. See Report by the Foreign Ministers of the Member States on the Problems of Political Unification, 4 E.C. BULL., No. 11, at 9 (1970).

180. See *supra* notes 34-37 and accompanying text (discussing European Council and European Political Cooperation).

181. *Eastern Europe*, Eur. Rep., No. 1560, Feb. 3, 1990, at 11, available in LEXIS, Europe Library, ALLEUR File. It was understood that the European Council would provide a much broader range of cooperation than the existing trade and cooperation agreements. *Id.*

that by then had been ongoing for a number of months. As with existing association agreements, it was envisaged that a free trade zone gradually would be created wherein there would be free flow of goods, persons, services, and capital. In mid-January 1990, the European Parliament, briefed by Frans Andriessen on the situation and the speed of change in Eastern Europe, approved a joint resolution expressing its support for the democratization process in Poland and its support of further Community aid.¹⁸² Weeks later, the EC Council voted in favor of the Commission's proposal on the association agreements.¹⁸³ The stated policy of the Community, however, was that the issue of eventual EC membership "will not be excluded, but it will not be included."¹⁸⁴ Sensing the Community's recalcitrance on this critical issue, Poland announced its unequivocal intent to pursue the membership path.¹⁸⁵ In retrospect, it is evident that, of the Community institutions, the EC Commission especially perceived the association agreements as yet another incentive to East Central Europe for continued economic and political reforms. To that end, although the EEC Treaty on its face imposes no legal requirement that a prospective associate have in place a democratic form of government as a prerequisite to the conclusion of an association agreement, EC Commission representatives made it clear to the three countries in March 1990 that a "fully democratic structure" in each constituted an absolute *sine qua non* of the anticipated association agreements.¹⁸⁶

Prior to submitting an outline of the proposed agreements for the Council of Ministers' approval in April, the Commission again reaffirmed its position that the stated objectives of the agreements would not expressly include the objective of

182. *See id.*

183. *See* Europe Agreements, *supra* note 10. The Commission opened an official delegation to Warsaw in September 1990.

184. *EEC/Eastern Europe: No Membership But More Cooperation*, Eur. Rep., No. 1570, Mar. 10, 1990 (statement of Frans Andriessen at March 6, 1990 press conference), available in LEXIS, Europe Library, ALLEUR File.

185. *Club de Bruxelles: Commission Announces EEC/Czechoslovakia Cooperation Agreement Initialled; Poland to Seek EEC Membership*, Eur. Rep., No. 1574, Mar. 24, 1990, at 9, available in LEXIS, Europe Library, ALLEUR File.

186. *Id.* (statement of Pablo Benavides, Director of East European Affairs of the Commission).

eventual accession.¹⁸⁷ The Commission continued to maintain that, as a matter of law, an express provision would be superfluous since Article 238 of the EEC Treaty applies to any democratic European country.¹⁸⁸ Unstated was the Community's view that association is a goal sufficient unto itself.

In accordance with the EEC Treaty's provisions, the Council adopted directives in mid-December 1990 authorizing the Commission to commence negotiations with Poland, Czechoslovakia, and Hungary.¹⁸⁹ Prior to the end of that year, "formal" negotiating sessions commenced on a separate basis with each of the three prospective associates.¹⁹⁰ "Informal" discussions had commenced earlier on a Polish draft agreement submitted to Brussels in June 1990 that Polish experts prepared after studying the EC's agreements with Turkey, Greece, and Portugal.¹⁹¹ Once negotiations were under way, Poland repeatedly called for a "political protocol" to be attached to the final agreement that specifically referred to Poland's eventual accession; the Commission continued to resist.¹⁹² Similar pressure was exerted by the Czechs and the Hungarians.¹⁹³ Addressing the issue in Prague in March 1991, Frans Andriessen spoke only in terms of providing understanding and support, inferring that the link being forged with

187. *EEC/Eastern Europe: Commission Prepares Talks on Closer Cooperation*, Eur. Rep., No. 1578, Apr. 12, 1990, at 8, available in LEXIS, Europe Library, ALLEUR File.

188. See EEC Treaty, *supra* note 1, art. 238. Observers were skeptical of the stated rationale: "[I]n reality the commission does not want the East Europeans to think of membership as an option for the foreseeable future." Grant, *supra* note 42, at 12.

189. The projected outline for the agreements had been developed in September 1990. See Sadurska, *supra* note 12, at 2505.

190. On December 20, 21, and 22, 1990, discussions commenced with Czechoslovakia, Hungary, and Poland, respectively. Commission Press Release, IP (91) 1033 (Dec. 23, 1990).

191. Miroslaw Glogowski, *Poland-EC: Behind the Negotiations*, WARSAW VOICE, Nov. 24, 1991, available in LEXIS, Nexis Library, OMNI File. Mr. Glogowski notes, however, that by and large there was a dearth of knowledge about the Community: "[T]he Polish Ministry of Agriculture . . . like several other [] [institutions] initially lacked a single employee familiar with EC matters." *Id.*

192. Barnard, *supra* note 69.

193. The three prospective associates repeatedly cited the prior association agreement between the Community and Greece that had referred to eventual Greek accession in both the preamble and in a substantive provision, and the existing association agreement with Turkey that also makes two such references. PINDER, *supra* note 117, at 71.

the three countries would be limited to the creation of a free trade zone between the associate countries and the EC.¹⁹⁴ Hungary's Prime Minister continued to advocate the East Central Europeans' entitlement to membership prior to the end of the century.¹⁹⁵

Nine monthly sessions between the Community and each country were held until agreement was reached by the already extended deadline of November 1991. The sessions with Poland were substantively difficult, especially concerning the issue of future Polish agricultural, steel, coal, and textile exports to the EC, in view of the Community's own long-standing difficulties in those areas. The products that Poland is most capable of exporting, farm produce, coal, steel, and textiles, are precisely those that the Community needs least.¹⁹⁶ The issue of agricultural exports resurfaced with increasingly less prospect of resolution. One outside expert, retained by the EC Commission to report to it on Eastern European issues, aptly noted that "the EC is profoundly schizophrenic in its attitude. It is pouring money and technical expertise into Eastern Europe to help raise farmers' yields, and at the same time it guards its own markets against cheaper produce from the East."¹⁹⁷

Briefly stated, the circular nature of the problem is as follows. Countries such as Poland are in dire need of capital to purchase modern equipment and technology from the West for use in virtually every economic sector. Increasing Poland's access to the EC's markets for relatively cheap Polish farm produce is unquestionably the quickest and easiest way to generate cash. Yet during the association discussions, EC negotiators specifically excluded agricultural produce, along with steel and textiles, from the Community's early offers of tariff cuts. To the Polish people, such a posture reeked of protectionism.

194. See *Association Agreement with EC to be Signed by End of 1991*, CTK National News Wire, Mar. 9, 1991, available in LEXIS, Europe Library, ALLEUR File.

195. Eva Kaluzynska, *Former Communist Countries Line Up to Woo European Community*, Reuter Bus. Rep., June 11, 1991, available in LEXIS, Nexis Library, OMNI File. Hungary's President Jozsef Antall stated that "it should be our turn in 1997 or 1998." *Id.*

196. *Id.*; Anne Wagner-Findeisen, *With Strings Attached—An Analysis of Exemptions Granted Under Article 85(3) of the EEC Treaty (1990)* (unpublished manuscript, on file with LL.M Program Director, Fordham University School of Law).

197. MERRITT, *supra* note 14, at 153.

Another observer noted that at "the same time that Jacques Delors was talking of bringing the East into the protective compound of Western Europe, Polish negotiators were chiseling out an agreement on quotas for Polish mushrooms."¹⁹⁸

On several occasions, the negotiations verged on the brink of failure as the Polish delegation perceived a lack of sufficient good faith effort on its counterparts' side.¹⁹⁹ One of the major stumbling blocks was the resounding rejection by France, Ireland, and Belgium of Frans Andriessen's proposal for three annual twenty percent cuts in tariffs on agricultural goods from Poland, Hungary, and Czechoslovakia.²⁰⁰ Seeking to protect French farmers, France in early September 1991 blocked progress on the agreement by refusing to grant access to Eastern European meat products.²⁰¹ Spain and Portugal expressed concern about increased access for textiles and steel.²⁰² EC negotiators were compelled to seek a mandate from the Coun-

198. Roger Boyes, *Snails trailing in Polish race for Western markets*, TIMES, Dec. 17, 1991. Mr. Boyes further stresses that "Poland, potentially, is one of biggest agricultural exporters in Europe. So far . . . only a trickle has entered the EC. Even under the new [association] agreement, there will only be a staggered increase. The agricultural balance of the EC could shift radically after Poland's accession." *Id.* Thus, notes Mr. Boyes, the GATT Uruguay Round's impact, if any, on modifications to the CAP "are becoming crucial to the relationship between Eastern and Western Europe." *Id.*

Whether the EC negotiators' protectionist stance can be attributed primarily to the 1992 single market program is unclear. Dire predictions of such protectionism have abounded among legal scholars. See, e.g., Jarvis, *supra* note 41, at 230 (stating that "the coming of the internal market heralds the closing of Europe to outside parties and the beginning of an era of new and unprecedented protectionism on the part of the members of the EC").

199. In July, "[t]he EC's resistance on liberalizing trade led to a situation where the agreement became questionable. The Polish delegation began to seriously consider leaving Brussels Things could have taken an unpredictable turn, had it not been for the failed communist coup in Moscow." Glogowski, *supra* note 191. However, stalemates continued to surface into the fall months. "Once again the Polish delegation lamented the lack of commitment made by the Community and urged the Commission to take a final step further in an attempt to consolidate the conclusion of the accords by the already extended deadline of mid-November." *EEC/Poland: Tough Turf Still to Cover in Association Talks*, Eur. Rep., No. 1715, Oct. 26, 1991, at 1, available in LEXIS, Europe Library, ALLEUR File. "Warsaw has learned this big lesson of free market international dealings: the political support of Western statesmen does not necessarily translate into favorable trade treatment." *International Reports*, IBC USA, Nov. 15, 1991, available in LEXIS, Nexis Library, OMNI File.

200. *Highlights*, 8 Int'l Trade Rep. (BNA) 1309 (Sept. 11, 1991).

201. Alan Riding, *The Soviet Transition; The New Europe: Will it Look East, or Inward*, N.Y. TIMES, Sept. 15, 1991, at A12.

202. *Row Between EC and Central European troika*, FIN. TIMES, Sept. 20, 1991.

cil providing additional negotiating flexibility and announced that they would be making a new offer to the Poles.²⁰³

In the interim, the Community reluctantly agreed to Poland's request for a mention of future EC membership, but only via a carefully worded reference to eventual accession in the preambles to the agreements.²⁰⁴ Czechoslovakia and Hungary extended this concession their agreements as well.²⁰⁵ The EC team negotiating with Czechoslovakia then reached agreement on the exact language.²⁰⁶ The agreements referred to and reflected the associates' hopes for future accession and the Community's view that "association should help them to attain this objective."²⁰⁷ Significantly, however, the preambles do not specify any time frame.²⁰⁸ Polish officials continue to stress that only when cast in the light of eventual accession can the association agreements promote the country's long-term economic stability.²⁰⁹

E. Scope and Breadth of the Agreement with Poland

1. General Provisions Common to Each of the Europe Agreements

Sufficient agreement finally was reached to permit the individual "initialling" in Brussels on December 16, 1991 of the three proposed association accords. The parties relegated a number of contentious trade-related issues to be dealt with in separate "protocols," as they have been with prior EC association agreements.²¹⁰ Because Article 238 of the EEC Treaty requires that all association agreements be ratified by each of the

203. Britain claims to have "pressed successfully for generous trade liberalisation" in the Europe Agreements. Douglas Hurd, *Trade and the Perils of Protectionism*, SUNDAY TELEGRAPH, Feb. 23, 1992, at 22.

204. Sadurska, *supra* note 12, at 2505. The Community was attempting to "keep Central Europe at a safe distance."

205. "The three countries interested in associating with the EC kept each other informed The applicants took advantage of each other's successes in negotiating individual parts of the agreement. . . . the Hungarians and Czecho-Slovaks used the Poles' success in introducing an entry about future full membership in the EC." Glogowski, *supra* note 191.

206. Commission Press Release, IP (91) 788 (Aug. 2, 1991).

207. *Id.*

208. Commission Press Release, IP (91) 1033 (Dec. 23, 1990).

209. *EC Initials New Free Trade Accords with Czechoslovakia, Hungary, Poland*, 8 Int'l Trade Rep. (BNA) 1720 (Nov. 27, 1991).

210. The EC-Swiss Trade Agreement for example, has five such protocols at-

associate countries,²¹¹ by the parliaments of each of the Member States, and by the European Parliament before the agreements can be officially concluded, the Europe Agreements also include "interim agreements." The Community may enter into these interim agreements as part of its own power to conduct external relations under EEC Treaty Article 113²¹² to avoid the lengthy delays inherent in the ratification process. Such interim agreements were to ensure that the majority of the trade-related portions of the Europe Agreements could become effective as of March 1992,²¹³ long before the ratification formalities could be completed. The parties to the interim agreement to which Poland is a signatory are the EC and the European Coal and Steel Community ("ECSC"), on the one hand, and the Republic of Poland on the other.²¹⁴ The interim agreement's legal effectiveness is based on its being a continuation of the 1989 Trade and Cooperation Agreement between Poland and the EC, and on a trade protocol entered into between the ECSC²¹⁵ and Poland in October 1991.²¹⁶ Originally intended to expire at the end of 1992, the interim agreements have been extended at the Community's request because the Member States have been unable to complete individual ratifications within the allotted time frame.²¹⁷

tached dealing with areas such as rules of origin, certain agricultural products, and tariff treatment for specified products.

211. EEC Treaty, *supra* note 1, art. 238. In Poland, the parliamentary body is known as the Sejm; it consists of 460 deputies elected for a four-year term and is the "lower house" counterpart of the Senate which consists of 100 senators. The members of the Sejm, along with the President and the Council of Ministers, have the right to initiate new legislation.

212. EEC Treaty, *supra* note 1, art. 113.

213. See Europe Agreements, *supra* note 10. The interim agreements went into force as scheduled. Council Regulation No. 521/92, O.J. L 56 (1992).

214. George L. Bustin et al., *EC Association Agreements: Time to Renegotiate?*, XI INT'L FIN. L. REV. 26 (Oct. 1992) [hereinafter Bustin].

215. The ECSC has been actively involved in contributing to the restructuring of Central and East European coal and steel industry by way of trade and cooperation agreements and loans of ECU200,000,000 earmarked for this purpose. *EEC/Eastern Europe Relations*, *supra* note 128.

216. *Id.*; O.J. L 105 (1991). Designated industrial and agricultural products from Poland will thus benefit promptly from the overall terms and conditions of the Europe Agreements.

217. Ratification at the present time is being further delayed by the Member States' preoccupation with the fate of the TEU. Some Polish officials are expressing concern about possibly deliberate delay of ratification of the agreement with Poland by those countries experiencing complications with their exports (for example cars)

For the first time the Europe Agreements include a cultural dimension and, far more importantly, a political dimension²¹⁸ that "introduces and institutionalizes regular meetings at the highest political level on all topics of common interest and is aimed at achieving convergence in the parties' positions on foreign policy matters."²¹⁹ Thus, in a major turnabout on the EC's part, the stage has been set for foreign policy and cultural exchange between the Community and the three countries, which will likely allow for the latter to attend, as observers, future "summits" of EC heads of state and government.²²⁰

The Europe Agreements were initialled in mid-December 1991. By then, Jacques Delors, whose *objet fixe* of political and monetary union appeared to be coming to fruition at the Maastricht summit, was markedly enthusiastic about the breadth of the Europe Agreements, differentiating them from "any ordinary association accords."²²¹ He stated that "the association . . . marks the reconciliation of Europe with itself. It is a fundamental change of direction."²²² Czechoslovakia's Vaclav Havel characterized the Europe Agreements as "possibl[y] the single most important agreement in our post war-history. It is a contract that specifically opens the door for us to the political and economic life of democratic Europe."²²³

to Poland. *Poland-EC Treaty Blocked*, GAZETA WYBORCZA, Oct. 24-25, 1992, available in LEXIS, Nexis Library, OMNI File.

The European Parliament's ratification of the association agreement with Poland took place on September 16, 1992. *European Parliament Approves Poland-EC Association Agreement*, PAP News Wire, Sept. 16, 1992, available in LEXIS, Nexis Library, OMNI File.

218. *Czechoslovakia-Hungary-Poland Sign Association Agreements with EC*, *supra* note 96.

219. Commission Press Release, IP (91) 1033 (Dec. 23, 1990).

220. The first meeting of the EC's ministers of Foreign Affairs with their Visegrad counterparts was held in early October 1992, and although no specific commitment was made on the Community's part to improve access to its markets, the EC leaders agreed that a "package of specific and balanced measures to improve market access" would be presented before year's end. *Development of EC Relations with Poland, Hungary and Czechoslovakia*, Reuter Textline, Oct. 8, 1992, available in LEXIS, Europe Library, ALLEUR File.

221. *Europe Enters New Era With Association Accords*, Eur. Rep., No. 1730, Dec. 17, 1991, at 1, available in LEXIS, Europe Library, ALLEUR File.

222. *Eastern Europe: Trade Accords Seen as Step Toward Full EC Membership*, 3 EXTERNAL IMPACT EUR. UNIFICATION, No. 19, Jan. 13, 1992, available in LEXIS, Europe Library, EURWCH File.

223. *President Diagnoses Ills and Reviews Successes in New Year Speech*, BBC, Summary

2. Trade Provisions Common to the Europe Agreements— Free Movement of Goods, Services, and Workers

The three agreements have identical structures and provide for the standard "association council."²²⁴ Although the agreements are technically of indefinite duration, the trade related provisions revolve around a concretely defined series of objectives that are scheduled to transpire over a ten year period; this period is further subdivided into two five-year phases.²²⁵ Overall, they establish preferential treatment of the associates by progressively abolishing mutual barriers to trade and by gradually introducing a free trade zone during the latter portion of the ten-year period. Products such as textiles and steel, which are covered by special protocols, will be dismantled at a slower rate than the overall industrial tariffs.²²⁶ Separate protocols will also deal with rules on origin, customs cooperation, and "safeguard" clauses.²²⁷

As may be expected, the agreements will not vest in Poles, Czechs, or Hungarians any rights of "establishment" in the EC or "free movement of persons" within the meaning of the EEC Treaty; however, nationals of the associate countries already established in the Community will benefit from improved treatment. At the end of the transitional period, as defined in the agreements, "national treatment" will be afforded to firms and professions wishing to establish themselves in a Member State. Free movement of capital, repatriation of invested capital and of gains thereon, investment operations, etc. are also guaranteed. A lengthy list of fields for enhanced economic cooperation, in which the parties have a mutual interest ranging from cooperation in precluding international money launder-

of World Broadcasts, Jan. 3, 1992, at EE/1268/B/1, available in LEXIS, Nexis Library, OMNI File.

224. See Europe Agreements, *supra* note 10; EEC/Eastern Europe Relations, *supra* note 128. The association agreement with Turkey provides for a similar Association Council. The council is to meet at least annually, and is to ensure proper implementation of the agreements. Also established in the Europe Agreements is an association parliamentary committee, which has an advisory role.

225. *Id.* The 10-year phase in will take place in two five-year stages. *EC Initials New Free Trade Accords with Czechoslovakia, Hungary, Poland*, *supra* note 209.

226. *Id.*; Anthony Robinson, *Survey of Poland*, FIN. TIMES, Apr. 28, 1992, at 4.

227. Safeguard clauses would permit a reversal of certain EC free trade obligations if Polish exports become too successful in EC markets. *EC Initials New Free Trade Accords with Czechoslovakia, Hungary, Poland*, *supra* note 209.

ing schemes to training and education programs,²²⁸ is aimed at enabling the newly associated countries to continue the restructuring of their economies and to become competitive by the end of the transitional period.

The greatest impact on the new associates will arise from the agreements' requirement of "progressive approximation of legislation" in each of the three countries, including the specific proviso that Community competition rules be adapted into the national legal systems.²²⁹ The Community's insistence on parallel regulation of competition is in tandem with the EEA agreements. In Poland's case, this is to be effectuated over a three-year period.²³⁰ In regard to regulation of competition on Polish territory, Poland, at the time of the negotiations, already had in place relatively strong anti-monopoly legislation.²³¹ The Polish negotiators suggested a radical innovation whereby, as soon as EC competition law is fully incorporated into Polish law, Polish undertakings would have direct recourse to the EC Commission under Article 85 of the EEC Treaty as is enjoyed by EC undertakings.²³² In other words, if a French and a German company engaged in conduct violative of Article 85 on Polish territory, then not only would

228. *EEC/Eastern Europe Relations*, *supra* note 128. The defined sectors of economic cooperation include the following: industrial cooperation, investment promotion and protection, product standards, scientific and technological cooperation, training and education, cooperation on social affairs, regional development, small and medium size enterprises, statistical cooperation, money laundering, drug trafficking, environment, transport, telecommunications, etc. *Id.*

229. PINDER, *supra* note 117, at 65. On the issue of the association agreements' anticipated requirement for approximation of the associates' internal laws, British scholar John Pinder opined in mid-1991 that it is not "seemly for the Community to insist that eastern countries abandon price controls and a system of import levies and export subsidies which have insulated their industries from international market forces, while at the same time insisting that it retain just such a system for its own agriculture." *Id.*; see *Interim Agreements with the EC*, FIN. TIMES, June 1992, available in LEXIS, Nexis Library, OMNI File.

230. EC rules on state aid to enterprises are also to be introduced, but not until the expiration of a five-year period, in view of Poland's current economic situation. EC rules on intellectual property are to be progressively approximated over a five-year period as of March 1, 1992. EC public procurement practices are to be put into immediate effect. *Trade Treaty with EEC-Timetable*, RZECZPOSPOLITA, No. 264, Nov. 15, 1991, available in LEXIS, Nexis Library, OMNI File.

231. *Competition Rather Than Tariff: Interview with Anna Fornalczyk, Head of Anti-Monopoly Office*, RZECZPOSPOLITA, No. 289, Dec. 12, 1991, available in LEXIS, Nexis Library, OMNI File [hereinafter Fornalczyk].

232. *Id.*; see EEC Treaty, *supra* note 1, art. 85.

they be liable under Polish law, but the case could be referred to the Court of Justice.²³³ Such a provision was of vital importance to the Poles who, while actively seeking to attract foreign investment, wanted to ensure that foreign companies would not carve the market into monopolies or oligopolies with impunity. The EC responded that the inclusion of such a provision within the context of an association agreement would create too much of a precedent; however, the parties included a provision that spelled out Poland's right to seek this condition from the Association Council upon its establishment.²³⁴

3. Trade Provisions in the Agreement with Poland

A separate trade liberalization calendar was established with each country over the next ten-year period. The time frames agreed to with Poland generally provide duty-free access to the EC for about fifty-five percent of Polish goods in the first year, gradually increasing to 100% by 1999.²³⁵ In areas where customs duties remain in force for some time, they will

233. Fornalczyk, *supra* note 231; see EEC Treaty, *supra* note 1, art. 85.

234. Fornalczyk, *supra* note 231; see EEC Treaty, *supra* note 1, art. 85. In addition to the EC's unwillingness to establish a precedent, the Poles discerned what they consider ulterior motives for the EC's refusal such as the reluctance to impose more work on Commission staff and, more importantly, a "gold-rush" mentality:

[T]here is strong pressure from the Western business community for not "civilising" countries in our part of Europe too fast. It is not unusual at all for Western businessmen coming here to treat us either as utterly ignorant or as people who, even if they possess some knowledge, are incapable of making use of it; furthermore, there is a belief that this disorderly environment provides good opportunities for some not-quite above-board business deals Often our interlocutors were surprised to find out we were acquainted with economic theories, or that we had a legal system.

Fornalczyk, *supra* note 231.

235. Liberalization schedule after implementation of agreement:

first year	— 70% of <i>P</i> goods will be duty-free
1993	— 71%
1994	— 73%
1995	— 76%
1997	— 77%
1997	— 85%
1998	— 100%

Schedule of specific goods and products affected:

Second year: 25 mineral products and chemical raw materials will be exempted from duty.

January 1996: five non-ferrous metals will be fully liberalized.

January 1997: elimination of customs duties for iron and steel products and a large group of so-called mutual trade sensitive products such as cements, a series of chemi-

be reduced gradually.²³⁶

Shortly after initialling the agreement, Poland's chief negotiator with the EC, Andrzej Olechowski, indicated that Poland's exports of industrial goods and agricultural produce to the EC will increase almost immediately. He projected that the 1990 figure of ECU5,000,000,000 worth of industrial goods exported will grow by fifteen to twenty percent a year, while farm exports will increase by between ECU100,000,000 and ECU200,000,000 over the 1990 amount of ECU5,000,000,000.²³⁷

The overall thrust of the agreement with Poland, as with many prior association agreements, is "asymmetrical." Poland was allotted the lion's share of the trade concessions during the first five-year phase. Not until 1995 will Poland commence lifting its own customs duties on imports from the EC, and then at a rate of only twenty percent during the second five year phase. The signatory parties anticipated that the cost of EC exports to Poland would be exceeded by the cost of Polish exports to the EC by at least several hundred million dollars.²³⁸ EC Members, on the other hand, are to gain new markets and obtain preferential trading status from Poland for their exports, as well as less quantifiable benefits resulting from the proposed political dialogue.²³⁹ As a practical matter, however, the asymmetry currently exists in reverse: the trade balance has been shifting to the Community's advantage since 1991 when the Community doubled its exports to Poland.²⁴⁰

cal products, casein, tires, leather and leather products, shoes, glass and porcelain products, radio and televisions, lamps, cars, and certain types of furniture.

January 1, 1998—liberalization of remaining goods—assuming that structure of exports does not change. Commission Press Release, IP (91) 1033 (Dec. 23, 1990).

236. Assuming the 1991 figure to be 100, the average customs duty on Polish industrial goods will be about 23% of that figure in 1992, 20% in 1993, 14% in 1994, nine percent in 1995, 5.5% in 1996, two percent in 1997, and zero percent in 1998.

237. *Poland-EC Agreement: Rewards of a New Market*, WARSAW VOICE, Dec. 22, 1991, available in LEXIS, Nexis Library, OMNI File. In farm produce the widest export opportunities are in pigs, hogs etc. for which the EC increased the limit by about ECU30,000,000 a year and in apples and apple products, also raised by ECU30,000,000 a year. In industrial goods, in descending order, greatest benefits will be felt by textiles, shoes, chemicals, glass, and porcelain industries. *Id.*

238. *EC Initials New Free Trade Accords with Czechoslovakia, Hungary, Poland*, *supra* note 209.

239. *Id.*

240. *EEC/Eastern Europe Relations*, *supra* note 128.

The immediate beneficiary of the Europe Agreement has been the Community, as technologically superior exports from the EC have quickly taken advantage of freer trade.²⁴¹ The protectionist stance of the EC on agricultural products is being viewed with alarm by OECD officials, who stress that, unless the West provides the markets for East European exports, economic recovery in countries such as Poland will be seriously jeopardized.²⁴² Mr. Olechowski, however, appears to be optimistic that further liberalization concessions will be made by the Community within five years.²⁴³ Prime Minister Suchoka currently stresses that further trade liberalization measures cannot be deferred.²⁴⁴

Significantly, and in stark contrast with many of the EC's existing association agreements, none of the Europe Agreements was accompanied by a firm commitment of financial aid. On the contrary, in Poland's case the EC took the position that Poland should address itself to the IMF, the World Bank, the G-24, commercial banks, and lastly, Brussels.²⁴⁵ The agreement merely "foresees" financial aid under the PHARE program through 1992, and under a new or similar framework thereafter, along with loans from the European Investment

241. By the Community's own reckoning, "[d]uring the first nine months of 1991, our imports from Poland further grew by 25%, while our exports doubled. As a result, the trade balance turned into the favour of the Community." *Id.* Community exports to Central and Eastern Europe rose by some 30% in 1991. *EC Trade with East Rising Rapidly*, Eur. Rep., Oct. 24, 1992, available in LEXIS, Europe Library, AL-LEUR File. Manufactured products accounted for 81% of this figure. *Id.* Imports from those countries rose by 21.4%. *Id.*

242. David Marsh, *The European Market: Central Europe Surveys an Imperfect Pact*, FIN. TIMES, May 11, 1992, at 4; see Jolanta Zombrat, *Poland's Entry into EC: Advantages and Costs*, GAZETA BANKOWA, No. 24, June 14-20, 1992, reprinted in POLISH NEWS BULL., June 19, 1992, available in LEXIS, Nexis Library, OMNI File.

Translated into hard economic facts, the prospect of Poland's entry into the EC no longer arouses the enthusiasm it used to incite two or three years ago. In fact, the integration with the EC and the costs inherent in it have become a divisive issue within the Polish community of economists and politicians A report on this subject was prepared by the Office of the Government's Plenipotentiary for European Integration and Foreign Aid. *Id.* at 1.

243. *Sejm Concerned Over Agriculture Provisions in Polish-EC Treaty*, PAP News Wire, May 27, 1992, available in LEXIS, Nexis Library, OMNI File.

244. *News Highlights*, PAP News Wire, Oct. 29, 1992, available in LEXIS, Nexis Library, OMNI File.

245. Alina Bialkowska, *In Stages Toward Free Trade*, GAZETA WYBORCZA, Nov. 13, 1991, at 5. "Poland is not happy with this proposal." *Id.*

Bank. Although this vague commitment obviously did not stop Poland from proceeding with the agreement, its full significance, or lack thereof, is now coming to the fore as Poland realizes that the heretofore steady and unconditional Western funding has slowed to a trickle and that the changes it has undertaken to make are a costly proposition.²⁴⁶

4. The Europe Agreement as the Critical Path for Polish Accession

While the numerous legal, fiscal, and economic measures that Poland has committed itself to adopt as a result of its association agreement will be implemented primarily in compliance with that agreement, it is clear that each and every such measure will be implemented with a view toward the time period beyond the ten-year phase envisaged in the association accords.²⁴⁷ Poland's prime motive is, quite simply, its unwavering objective of full EC membership at the end of ten years, if not sooner.²⁴⁸ The vast commitment to a comprehensive regulatory revamping that Poland has undertaken would make little sense to Poles absent any prospect of EC membership.²⁴⁹

Officials outside the Community and observers in general have been critical of the Community's apparently superficial commitment to prompt integration of the new associates. Jacques Attali, President of the EBRD, has repeatedly condemned the European Agreements for focusing on restricting the associates' access to key western markets rather than on integrating them.²⁵⁰ Journalist Richard Davy points to two major "black

246. *Id.*

247. Maciej Urbaniak, *Biala ksiega*, GAZETA BANKOWA, Jan. 2, 1991, at 4. Polish Prime Minister Hanna Suchocka emphasizes that full EC membership is Poland's unchanging goal and the Communities are an anchor of Polish political and economic stability. *News Highlights*, *supra* note 244.

248. Urbaniak, *supra* note 247.

249. *Id.*

250. *Eastern Vision*, FIN. TIMES, Oct. 29, 1992, at 18. A team of lawyers with the firm of Cleary, Gottlieb, Steen & Hamilton offers the following observations:

Controversy has heated up over the EC's agreements of association Jacques Attali, President of the [EBRD], told a European Community conference in early September that the Association Agreements should be renegotiated "on better and more open terms, treating [the Associates]—and any other countries willing and able to join—as future equal members of an economic community rather than competitors to be kept out." . . . EC companies initially will be the primary beneficiaries of the Association Agree-

holes" undermining the value of the Europe Agreements as originally concluded, the first being the Community's lukewarm handling of the prospective membership question, and the second being "the timorous and hypocritical way it shields itself from Central European imports. With self-defeating absurdity, it helps these countries to modernise and then shuts out the goods they must sell if they are to earn their way out of trouble."²⁵¹ In other words, the economic pain that the associate countries must undergo in order to attain minimum economic eligibility for eventual membership is in fact exacerbated by the EC's own protectionism.²⁵²

IV. CANDIDATES FOR ACCESSION AND LEGAL FRAMEWORK OF NEGOTIATIONS

A. *Neutrality and NATO—Problematic Issues Related to the Pending and Anticipated Applications from EFTA Countries*

Article 237 of the EEC Treaty lays down the requirements for the accession of any European state.²⁵³ Since its inception in 1958, the EC has undergone several expansions, each of which has served to demonstrate that "even the accession of a free and democratic European country is not without considerable difficulties."²⁵⁴ Thus despite the EEC Treaty's "openness in principle," the Community has invariably proven reluctant

ments. This is because in large measure the Association State industries cannot currently compete well in manufacturing and service areas where they may lack the equipment and the experience.

Bustin, *supra* note 214.

251. Richard Davy, *You Can Have Our Aid, But Don't Ask for Trade*, *INDEPENDENT*, May 26, 1992, at 21.

252. *Broaden the Market*, *TIMES*, Jan. 5, 1993; *Western Europe's Economic Night is Key to Stability in the East*, *CHRISTIAN SCI. MONITOR*, Jan. 12, 1993, at 19.

253. EEC Treaty, *supra* note 1, art. 237.

Any European State may apply to become a member of the Community. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament which shall act by an absolute majority of its component members.

The conditions of admission and the adjustments to this Treaty necessitated thereby shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the Contracting States in accordance with their respective constitutional requirements.

Id.

254. Dagoglou, *supra* note 15, at 150.

to consider new members.²⁵⁵

In practice, when an application for membership is received by the Council, it requests the Commission to prepare a report on the application. This process alone can take several years. After the Commission's report is submitted and reviewed, the Council decides whether to authorize the commencement of formal negotiations. Accession negotiations, once they actually commence, are apt to last several years.²⁵⁶ If the terms of a treaty of accession are agreed upon, the twelve national parliaments of the respective Member States as well as the European Parliament must ratify them.²⁵⁷

As of this writing, seven countries have formal membership applications pending: Austria, Cyprus, Finland, Malta, Sweden, Switzerland, and Turkey. The Community to which these countries may ultimately accede will undoubtedly be a different entity than the one to which they originally applied. The Community's steady movement toward social, political, and monetary union, in addition to economic integration, ensures a significant transformation.

East Germany, of course, did not technically "accede" to the EC; it was legally "absorbed" by the Federal Republic of Germany. Former East German law initially remains in effect only to the extent it does not violate Federal Republic or European Community law.²⁵⁸ Although eighteen additional seats were added to the European Parliament to reflect reunified Germany's larger population,²⁵⁹ Germany might insist on yet more seats, thus raising the prospect of increased voting weight vested in the Member State that is already the largest contributor to the EC budget. The political impact of a reunified Germany on future enlargements of the Community should not be underestimated. The increased size of Germany produced a school of thought within the Community that the best way to offset increased German power is by expanding the

255. *See id.*

256. For example, although Portugal and Spain applied for membership in mid-1977, their actual accession did not take place until nearly 10 years later. *Id.* at 156.

257. Elles, *supra* note 35; *Looking Eastward*, *ECONOMIST*, July 8, 1989, at 38.

258. Werner F. Ebke, *Legal Implications of Germany's Reunification*, 24 *INT'L LAW* 1130 (1990).

259. William Drozdiak, *Differences Over Form of a United Europe Remain as Crucial* *Dec. 9 Summit Nears*, *WASH. POST*, Nov. 22, 1991, at A-40.

Community's membership.²⁶⁰ France supports active Community involvement in the economic development of Central Europe as the "only way to counterbalance German economic dominance"²⁶¹ in that region. France, however, seems equally intent on maintaining the Western European orientation of the EC's membership in the foreseeable future and thus favors the prompt accession of the EFTA countries.²⁶²

It is increasingly clear that, notwithstanding the order in which applications have been or will be submitted to the Council, certain candidates, notably the EFTA countries, are on a much faster track to membership than other applicants.²⁶³ Each is a relatively affluent democratic country with many existing legal, historical, cultural, and commercial links with the EC Member States. Irrespective of the EEA, additional EFTA countries such as Norway are expected to apply for full membership. Austria submitted its application in 1989,²⁶⁴ Sweden applied in 1990, Finland in early 1992,²⁶⁵ and Switzerland in mid-1992. Although the accession of these candidates may take place as early as 1995,²⁶⁶ uncertainties as to the TEU may produce delays.²⁶⁷ While there is certainly disagreement within the ranks of the twelve EC Member States concerning the desirability of prompt positive reaction to Austrian, Swedish, and Swiss overtures,²⁶⁸ any such difference of opinion

260. Krause & Schmidt, *supra* note 23.

261. Kramer, *supra* note 172.

262. *Id.*

263. See, e.g., Janet McEvoy, *EC Unlikely to Give Pledges on Eastern European Membership*, Reuter Libr. Rep., Oct. 26, 1992, available in LEXIS, Nexis Library, OMNI File. Mr. Andriessen, for example, has stated that he foresees two successive waves of expansion: the EFTA countries first, followed by Cyprus, Turkey, Malta, and the three Central European associates. Bos-Karczewska, *supra* note 80. France and Germany are urging that accession negotiations with the EFTA applicants be undertaken "as soon as possible." Ian Davidson, *France and Germany Back EC Expansion*, FIN. TIMES, May 23, 1992, at 2.

264. 1991 *International Reports*, IBC USA, July 26, 1991, available in LEXIS, Nexis Library, OMNI File.

265. *Finnish Prime Minister in Portugal to Present EC Application*, BBC, Summary of World Broadcasts, Mar. 20, 1992, at EE1334/i, available in LEXIS, Nexis Library, OMNI File.

266. See Tom Redburn & Charles Goldsmith, *EC Still Stumbles on Word: Federal*, INT'L HERALD TRIB., Dec. 4, 1991.

267. McEvoy, *supra* note 263.

268. "EC officials are not so sure about a rapid timetable for Sweden. 'Sweden may be trying to rush things too much,' an official said. 'There is too much confusion

pales in comparison to the far more divisive question of membership for the fledgling democracies of East Central Europe.²⁶⁹

Historically, the Scandinavian countries, for whom membership was not even on the agenda until "they began to feel the chill" of the 1992 Single Market program, have demonstrated what has been described as a "smorgasbord" approach to EC membership.²⁷⁰ Greenland officially acceded to the Community in 1973 but later withdrew due to the EC's fishing policies.²⁷¹ Norway also refused to join on account of these same fishing policies.²⁷² The major bone of contention over the nordic countries' joining the EC has been their insistence on political "neutrality" in the international arena, and they have been loathe to give ground on a position which has formed the central tenet of their foreign policy for decades. Norway, particularly intent on maintaining its neutrality, in 1972 decided against pursuing membership after a national referendum.²⁷³ Switzerland's neutrality, of course, predates World War II and was respected even by Adolf Hitler.

The enactment of the SEA and its express incorporation of political cooperation and reference to a common European defense position strengthened the EC Commission's long-standing position that neutrality is inconsistent with the EC membership. Throughout his tenure, President Delors has

and uncertainty right now about where things go from here.' " Tom Redburn, *Sweden's Bildt: Full Tilt Toward the EC*, INT'L HERALD TRIB., Oct. 27, 1992, at 37.

269. Lewis, *supra* note 38. However, some Member States such as Italy and Germany have been articulating support for the three new associates to become full members before the turn of the century. *Suchocka Visits Pope and Italian Premier in Rome*, PAP News Wire, Oct. 24, 1992, available in LEXIS, Nexis Library, OMNI File. The Italian Premier assured the Polish Premier that "the Italian Parliaments [sic] delay in ratifying the treaty for associate membership . . . was simply a procedural matter." *Id.*; see Rolf Soderlind, *Genscher Wants Early EC Membership for East Europeans*, Reuter Libr. Rep., Mar. 21, 1992, available in LEXIS, Nexis Library, OMNI File.

Sweden, an EFTA country whose membership application to the EC is pending, has expressed strong support for bringing Central and Eastern European countries into the Community. Swedish Prime Minister Carl Bildt recently described this issue as one of the neglected topics on the European agenda. Redburn, *supra* note 268.

270. Iceland simply opted to drop out from the EC because it felt that continued membership would adversely affect its major national industry, fishing. See Tony Thomas, *The Nordic Alternative: Part-time Europeans*, ECONOMIST, Nov. 21, 1987, at 18.

271. Jarvis, *supra* note 41, at 227 n.2.

272. *Id.*

273. Grant, *supra* note 42.

been hostile on the issue of accession of such "neutral" states.²⁷⁴ As recently as 1987, the mere notion of reconciling Sweden's and Finland's neutrality with EC membership appeared inconceivable in view of their geographical proximity to the Soviet Union.²⁷⁵ Delors' idea of the EEA was motivated at least in part by an unwillingness to deal with the accession of traditionally neutral countries.²⁷⁶

Neutrality will be much less of an issue in the future due to the demise of the Soviet Union and the Warsaw Pact. Although the TEU contains a provision permitting Ireland to maintain its traditional neutrality, the latter has indicated that it may forego that policy in view of geopolitical developments.²⁷⁷ Switzerland similarly indicated that its historical neutrality will not pose a problem.²⁷⁸ In connection with its recent application to the EC, Finland expressed the belief that it can continue "staying outside military alliances" without compromising its acceptance of European union and its objectives of a common foreign and security policy.²⁷⁹ Commission officials appear less sanguine, and underscore that newcomers must adhere to all security and defense implications of the proposed TEU.²⁸⁰

No comparable neutrality issues arise in connection with any of the Visegrad trio. On the contrary, in the early post-communist phase, they eagerly studied the post-World War II defense-related institutional frameworks. Poland's particular security-related concerns regarding the finality of its western borders with a reunified Germany have been put to rest with the conclusion of two bilateral treaties with Germany in late

274. *Id.*

275. *Id.*

276. Brown, *supra* note 166.

277. *New EC Members Must Take Full Package, Brittan Says*, Reuter Libr. Rep., Mar. 6, 1992, available in LEXIS, Nexis Library, OMNI File.

278. *The Week In Europe: Andriessen In U.S. for Talks with Baker*, Origin Universal News Services, May 28, 1992, available in LEXIS, Nexis Library, OMNI File.

279. Stephen Brown, *Europe Needs a Neutral Finland, Premier Says*, Reuter Libr. Rep., Mar. 20, 1992, available in LEXIS, Nexis Library, OMNI File. Finland is apparently counting on the fact that the WEU, apparently slated to become the Community's "defense arm" does not currently include Denmark, Greece or Ireland. *Id.* The Finnish statement appears to take for granted that its application will be considered jointly with those of Sweden and Austria rather than in the order in which it is received.

280. *New EC Members Must Take Full Package, Brittan Says*, *supra* note 277.

1990 and in mid-1991.²⁸¹ Thus, the Central Europeans increasingly are interfacing with those security institutions in which EC Member States participate, principally the Council of Europe, NATO, the Western European Union (the "WEU"), and the Conference on Security and Cooperation (the "CSCE").²⁸² The Community's eventual political union, taking place in a totally new international order on the European continent, calls into play its future relations with these bodies. Even in the still evolving political landscape of the new Europe, observers have discerned that Jacques Delors and a core of Community leaders already have well-defined ideas about the future defense role of the EC. There is an ongoing debate whether the Community should create its own defense arm in addition to its existing relationships with both NATO and the Western European Union. France and Germany have proposed a distinct EC defense identity and are currently advocating the creation of an initial Franco-German corps of some 35,000 troops to give the EC its own military capacity and are calling upon other Member States to participate.²⁸³ Britain and Italy support the existing NATO alliance²⁸⁴ while stressing that the WEU should be merged into the EC.²⁸⁵

European defense and security are areas in which a lengthy and gradual transition are foreseen²⁸⁶ as the "security

281. See *infra* note 449 and accompanying text (discussing Poland's bilateral treaties with Germany).

282. The Council of Europe is a French-based organization to which all EC and EFTA Member States belong. The Council's Statutes mandate that each country acknowledge and adopt basic principles of fundamental freedom and the rule of law. See Frowein, *supra* note 19, at 1312. After becoming a signatory to the Convention on Human Rights, Poland became a member in 1991, as did Czechoslovakia and Hungary.

The February 1992 meeting in Strasbourg marked Poland's first official participation. *Economic and Legal Information From Poland*, vol. I, No. 9-11 (Nov. 1991).

The nine-member Western European Union (WEU) is a grouping that includes all EC countries except Denmark, Greece, and Ireland, and was "originally designed to hedge against postwar German rearmament." Hans Binnendijk, *The Emerging European Security Order*, 14 WASH. Q. 67 (1991). The Conference on Security and Cooperation (CSCE) in Europe is a Soviet-inspired grouping that includes the United States, Canada, and all European states except Albania. See Hugh De Santis, *The Graying of NATO*, 14 WASH. Q. 51 (1991).

283. Davidson, *supra* note 52, at 2.

284. Redburn & Goldsmith, *supra* note 266.

285. *Political Union: Difficult Return to Debate on EEC Foreign and Security Policy*, Eur. Rep., No. 1709, Oct. 5, 1991, available in LEXIS, Europe Library, ALLEUR File.

286. Krause & Schmidt, *supra* note 23.

vacuum" created by the demise of the U.S.S.R. as a military power refocuses on distinct current dangers such as armed ethnic conflict. The new Central European democracies are joining both existing institutions and a series of the surfacing international organizations. For example, in December 1991, an entity named the North Atlantic Cooperation Council (the "NACC") met for the first time at NATO headquarters in Brussels.²⁸⁷ A Joint Declaration issued at the end of the Council's first meeting reflects the Members' acute awareness of the vast gulf the new democracies must traverse in attaining economic and political stability.²⁸⁸ The Joint Declaration foresees "interlocking networks of such institutions as NATO, the EC, and the CSCE."²⁸⁹ The first of such networking relationships has taken the form of a NATO "Work Plan for Dialogue, Partnership and Cooperation" with NACC members.²⁹⁰

Also new to the scene is the "Council of the Baltic Sea States"²⁹¹ formed with the active participation of the EC, and designating itself as a "modern Hanseatic League." Thus, Poland's geographic location between Germany and Russia, "albeit historically her greatest misfortune, may turn out to be her biggest asset in a new Europe."²⁹² Poland's location on the

287. Kaluzynska, *supra* note 118. NACC initially consisted of the 16 members of NATO as well as Hungary, Poland, Czechoslovakia, Romania, Bulgaria, and the Baltic States. Several of the CIS nations have since joined.

288. "The success of efforts to create modern competitive market economies is essential to overcoming grave economic disparities and thus enhancing our common security and stability . . . security depends on political, economic, social and environmental factors as well as defense." *NATO and Former Warsaw Pact Meet Around Table of Friendship*, Agence France Presse, Dec. 20, 1991, available in LEXIS, Nexis Library, OMNI File.

289. *Id.* German Foreign Minister Genscher recently "described the North Atlantic Cooperation Council as a 'new support' in the new all-European architecture; the others include the CSCE, the European Community, the European Council, and NATO." *Cooperation Council Welcomes New Members*, WEEK GERMANY, Mar. 13, 1992.

290. The Plan is intended as "a practical expression of the cooperative partnership between membership countries." *Visit to Poland by British Ambassador to NATO*, PAP News Wire, Oct. 20, 1992, available in LEXIS, Nexis Library, OMNI File.

291. Its members are Norway, Sweden, Finland, Denmark, Germany, Poland, Czechoslovakia, Lithuania, Latvia, Estonia, and Russia. Henning Christopherson, Deputy Chairman of the EC Commission, took part in the Council's founding conference; its initiators were Denmark and Germany. Juliusz Urbanowicz, *Council of Baltic Sea States: United Stand, Divided Interests*, WARSAW VOICE, Mar. 15, 1992, available in LEXIS, Nexis Library, OMNI File.

292. MAREK KASZUBSKI, OVERVIEW OF THE LAW GOVERNING FOREIGN INVESTMENT IN POLAND (1990).

Baltic Sea places it squarely in the middle of the continent.²⁹³ The stated aim of the Baltic Cooperation Council participants is regional cooperation with the joint participation of the Community and, in particular "to support democratic institutions in the newly created democratic countries, as well as providing economic cooperation and humanitarian aid."²⁹⁴ Environmental protection, energy, transport, and communications are also targeted for cooperation. At the Council's initial meeting in Copenhagen, the non-EC members of the fledgling Council hastened to utilize it as yet another forum for formally voicing their common aim of EC membership, and appear to have read express encouragement and implicit promises in the speeches made by their Community neighbors.

Irrespective of growing regional ties, Poland's main security-related focus has been on the one organization which it views as the pillar of stability of Europe, NATO.²⁹⁵ Although NATO has advised Poland that NATO would not yet consider it for membership,²⁹⁶ Poland has sought, along with the other Central European countries, increased military and political cooperation from NATO²⁹⁷ in the form of some minimal security guarantee. NATO initially rebuffed the Central European countries' overtures.²⁹⁸ It now appears that the desired links with NATO will be facilitated by the NACC; however, as with EC membership, Poland has set its ultimate sights on entry into NATO²⁹⁹ and is restructuring its armed forces to facili-

293. *Id.*

294. *Id.*

295. *Former Prime Minister Bielecki Admits Making Errors*, PAP News Wire, Dec. 21, 1991, available in LEXIS, Nexis Library, OMNI File.

296. Hungary was accepted into NATO's parliamentary arm, the North Atlantic Council, as a non-voting associate in early 1991. *Chronology 1991*, 71 FOREIGN AFF. 184, 206 (Patricia Lee Dorff ed., America & the World 1991-1992).

297. *Bielecki's Government Presents State of Nation Report*, 1992 BBC, Summary of World Broadcasts, Jan. 3, 1992, at EE/1268/B/1, available in LEXIS, Nexis Library, OMNI File.

298. *Bulgaria Calls for NATO Security Guarantees*, Agence France Presse, Dec. 20, 1991, available in LEXIS, Nexis Library, OMNI File.

299. See Adam Jasser, *Polish Army Gets Overhaul with Eye to NATO*, Reuter Libr. Rep., Oct. 26, 1992, available in LEXIS, Nexis Library, OMNI File; see *NATO's Military Chief Rules Out Polish Membership for Now*, Agence France Presse, Mar. 12, 1992, available in LEXIS, Nexis Library, OMNI File. As a result, one Polish official "said it was impossible for the moment to set a timetable for Polish entry into NATO, adding that it was necessary to move forward 'step by step.' " *Id.*

tate such entry.³⁰⁰

B. *The Other "Second Tier"—Malta, Cyprus, and Turkey*

Turkey has been an associate of the EC since 1963, and the agreement of association, which has been modified several times, specifically refers to the possibility of Turkey's future accession to the EC in the preamble and in Article 28. An additional protocol in 1970 called for the creation of a customs union over a twenty-two-year period commencing in 1973.³⁰¹ By failing to ratify this aspect of the association agreement, Greece has successfully blocked (primarily for political reasons) the likelihood of such a free trade zone between Turkey and the EC by 1995, an important Turkish objective. Turkey then formally applied for EC membership in 1987. A full two years elapsed before the Commission advised Turkey that its application would not be considered until after 1992.³⁰²

Member States other than Greece have been deeply ambivalent about Turkey's accession. Specific concerns are Turkey's size and population which are larger than any Member State, its substantially lower level of development than the European average (fifty percent of workers are employed in agriculture), and its poor record on human rights.³⁰³ The Commission Opinion on the Turkish application also signalled continued repression of political pluralism, long running disputes with a particular Member State, and the situation in Cyprus.³⁰⁴ Notwithstanding, the Commission Opinion confirmed Turkey's eligibility for membership.³⁰⁵ Proponents of Turkish membership, notably the United States, point to the fact that Turkey, a member of NATO, has made important contributions to European security. Such contributions include Turkish cooperation in the 1991 Gulf War and that the accession of a primarily Islamic state would create a much needed bridge between Europe and the Islamic countries.³⁰⁶

300. Jasser, *supra* note 299.

301. EC Commission, *The European Community's Relations with Turkey*, RAPID, Sept. 27, 1991, available in LEXIS, Europe Library, ALLEUR File.

302. Bruce R. Kuniholm, *Turkey and the West*, 70 *FOREIGN AFF.* 34 (Spring 1991).

303. *Id.*

304. See EC Commission, *supra* note 301.

305. See *id.*

306. *Id.*

Malta has had three association agreements with the EC commencing in 1971; the provisions of the current agreement run through 1993.³⁰⁷ Aware that the queue for EC membership was rapidly lengthening, Malta put in its formal application in July 1990.³⁰⁸ The Commission is in the process of preparing its report on the application.³⁰⁹ Malta's submittal thus follows those of Austria, Turkey, and Cyprus but it already has plans for all new legislation to be drafted in line with EC regulations, and for all current laws, taxes, and tariffs to be adjusted in stages.³¹⁰ The Commission is aware that membership for Malta would make it a greater beneficiary of EC "structural funds"³¹¹ than a contributor to the Community's budget because "it is estimated that Malta would contribute [£10,000,000 to £11,000,000] annually, but would receive [£30,000,000] in return . . . [t]here would also be the prospect of tapping various other EC funds."³¹² Member States such as Spain, which benefit greatly from EC development funds, are less inclined to support accession of developing countries that are likely to compete for the same funds; conversely, they hope that the accession of the EFTA countries would induce the latter to invest in the southern Member States.³¹³

Emerging concerns about increasing Germany's voting power may indirectly prejudice the Maltese application, at least until such time as major institutional reform is achieved on Member States' voting rights. Addressing a Maltese audience in early 1992, Sir Leon Brittan of the EC Commission warned that Malta's small size could hinder its accession ambitions; another tiny Member State would further exacerbate the existing imbalance inherent in the Council's "weighted" voting struc-

307. Richard Evans, *Malta-Hurdles in the Way of Early EC Membership—Lively Debate Over Malta's Application to the European Community*, FIN. TIMES, Jan. 28, 1991, at IV (stating that "Malta has benefited greatly from increased trade. Around 75 per cent of its trade is now with EC countries").

308. *Id.*

309. *Id.*

310. *Id.*

311. Structural funds were introduced by the Community in 1987 for the purpose of accelerating the development of the less wealthy Member States. See *infra* notes 466-75 and accompanying text.

312. Evans, *supra* note 307, at IV.

313. Christopher Lynch, *Spain: 1992 and Beyond*, 112 BUS. AM. 2, Aug. 26, 1991.

ture.³¹⁴ Sir Leon stressed that, for example, minuscule Luxembourg has one full vote, whereas a unified Germany has only two.³¹⁵ Reports on the Commission's future plans to restructure the Commission's presidency which currently rotates every six months so as to preclude a "minnow" state from managing foreign policy³¹⁶ also appear to indicate that Malta and Cyprus might not be welcome unless and until such reforms are firmly in place.

With the near simultaneous conclusion of the Europe Agreements and the TEU, the newly evolving conventional wisdom is that membership for Cyprus, Malta, and Turkey, in particular the last, is unlikely to precede that of the Central European candidates.³¹⁷ Future accessions are now foreseen in two major "waves"—the EFTA states followed by Hungary, Czechoslovakia, and Poland.³¹⁸ Certain Community officials have of late been stressing that a "small, fast enlargement" to include the EFTA countries is a de facto prerequisite to the more complex accession of the Central European states.³¹⁹ In the interim, the Central European States must attain an adequate economic level and political stability.³²⁰ If they are successful, their accession appears to pose fewer perceived ethnic dilemmas—the notion that their history and culture are equally "European" appears to be taking ever firmer root in the minds

314. Extracts from a Speech by Sir Leon Brittan at the Chamber of Commerce, Valletta, Malta, *reprinted in* Commission Press Release, IP (92) 36 (Jan. 20, 1992).

315. *Id.*

316. Observers anticipate that the Commission may propose "an average of fewer than one commissioner per country" and that larger countries "especially Germany—should have more weight in the European Parliament." *A Sea of Change*, *ECONOMIST*, Mar. 14, 1992, at 55.

317. See, e.g., *Europe's Open Future*, *ECONOMIST*, Feb. 22, 1992, at 47. "Enlargement raises an invidious question: who to leave out. Turkey has already been rebuffed once. Cyprus and Malta, who have applied, may also be asked to come back later. It is not only to the east that Europe's borders grow fuzzy. The Mediterranean helps, but where, to the south, does Europe stop?" *Id.*; see William Drozdiak, *Finland Applies for EC Membership; Community Reassesses Growth Plans Amid Surge of New Candidates*, *WASH. POST*, Mar. 19, 1992, at A20.

318. See *A Sea of Change*, *supra* note 316, at 55; David Buchan, *All at Sea In Europe: Why the EC Ship of State is Drifting*, *FIN. TIMES*, May 5, 1992, at 18; Joe Fitchett, *EC Quandary: Conveying the Spirit of Maastricht*, *INT'L HERALD TRIB.*, Feb. 10, 1992.

319. Henning Christophersen, Speech to the Finnish Institute of International Studies, Helsinki, May 21, 1992, *reprinted in* Commission Press Release IP (92) 415 (May 22, 1992).

320. *Id.*

of western European opinion leaders.³²¹

V. PARLAYING ASSOCIATION INTO ACCESSION

A. *The Major Hurdles—General Observations*

The Community's attitude toward eventual accession of the three new associates was summarized succinctly by the EC Commission's chief negotiator of the Europe Agreements, Pablo Benavides. The association agreements will provide both sides with a "good trial run on the pro's and con's of EC membership [but are] . . . by no means a ticket for admission."³²² In regards to the probability of Poland parlaying its current associate status into full EC membership within the next decade, several observations can be made. First and foremost is the relatively "objective" criterion inherent in the EEC Treaty that an aspiring state must have a relatively stable democratic form of government which, by definition, means it must have a functioning, free market economy in place.³²³ Second, and much more difficult to ascertain as of this writing, is the impact of any amendments to the EEC Treaty which may result from the TEU. Third, and equally difficult to ascertain are the more purely political positions on expansion that will be evidenced by the EC Commission and the collective will of the then-current Member States. If all seven EFTA countries are absorbed by 1995, seventeen Member States will be involved in the process and the EC Commission will comprise a new constituency. There is already some concern that "the Com-

321. *Id.* Luxembourg's Prime Minister is quoted as opining as follows: Countries are going to arrive in waves. There should not be any problem about incorporating Austria and other countries in EFTA. We will have to consider Hungary and Czechoslovakia and perhaps with slightly less certainty, Poland. It's inconceivable for a new Europe not to include countries whose history and cultures are so intertwined with ours. The Baltic States, I think should initially seek to form an economic union on the Benelux model.

Id.

322. *EC Initials New Free Trade Accord with Czechoslovakia, Hungary, Poland, supra* note 209, at 1720-21.

323. EEC Treaty, *supra* note 1, art. 8b. The relationship between democracy and a market economy is explained by Mr. Pinder as follows: "It is doubtful whether a command economy is compatible with pluralist democracy. It has long been argued that a market economy is the economic aspect of civil society and there have been no examples of pluralist democracies with command economies." PINDER, *supra* note 117, at 45.

munity may raise the drawbridges after the rich EFTA nations enter."³²⁴

Present-day politics place Britain firmly in the pro-Visegrad camp. Britain announced that one of the top priorities of its six-month EC presidency would be to assist Poland, Czechoslovakia, and Hungary to consolidate their reforms and join the EC as full members prior to the end of the decade,³²⁵ perhaps even as early as 1996.³²⁶ British Prime Minister John Major espouses the view that the Community should welcome all European countries that are willing to join and to take on the responsibilities of membership.³²⁷ John Major's ostensible commitment to their cause was welcome news for the three associates, but they had not reckoned with the complications unexpectedly encountered by the EC with ratification of the TEU. Suddenly the Community's plate was full (again) and Prime Minister Major became increasingly bogged down with issues of integration which were much closer to home.³²⁸

Further, the Community's stated intent to conclude "Europe Agreements" with countries such as Bulgaria and Romania appears to have triggered a perception that the once symbolic impact of the nomenclature is being diluted. In what appears to have been a dry run for the London Summit, Poland, Hungary, and Czechoslovakia in September 1992 submitted a joint memorandum to the EC Commission, pressing for

324. Redburn, *supra* note 268, at 37.

325. *UK to Use EC Presidency to Help New Democracies*, Reuter Libr. Rep., Feb. 4, 1992. Reuters quotes the following Foreign Office statement: "The Community must forge closer relationships with other European states, welcoming as members those countries who apply and are ready for membership both politically and economically." *Id.* "Britain will seek to use its presidency of the EC in July to begin the process of expanding the organisation to include countries such as Sweden, the new democracies of Eastern Europe and, eventually, Russia . . . Mr. Hurd, Foreign Secretary, [stated]." *Parliament and Politics: Tories to Seek Expansion*, DAILY TELEGRAPH, Feb. 5, 1992, at 13.

326. Ivor Owen, *Hurd Urges Caution in EC: Premature Transfer of More Power to Brussels will be Resisted*, FIN. TIMES, May 9, 1992.

327. Philip Webster, *Major Calls for EC to be Enlarged*, TIMES, Mar. 10, 1992.

328. *Failure of Vision*, INDEPENDENT, Oct. 29, 1992, at 26.

One of the many good reasons for getting the Maastricht treaty out of the way as soon as possible is that its travails are distracting attention from the looming problems of central and eastern Europe. If the European Community fails to rise to the challenge they pose, its internal wrangles will pale into irrelevance beside the turbulence on its doorstep.

Id.

prompt ratification of their respective treaties, further trade liberalization for food, textiles, and steel, and most importantly, urging a target date for entering into formal membership negotiations "no later than 1996."³²⁹ Additionally, they pressed the Community to articulate objective criteria "whose fulfillment would be required for starting talks on membership."³³⁰ No formal response from the Community is foreseen prior to the conclusion of the Edinburgh Summit in December 1992,³³¹ however, Western European commentators have been quick to opine that the EC's reaction will be less than enthusiastic.³³²

The London Summit took place as scheduled in late October 1992. John Major and Jacques Delors met with Polish, Hungarian, Czech, and Slovak representatives in London; it was the highest level meeting to date.³³³ The Visegrad group extracted a promise that the eligibility criteria for which they have pressed would be forthcoming prior to the Community's Edinburgh Summit in December 1992.³³⁴ On the whole, however, they appear to have gained little more than further promises of "regular political contacts" geared toward "developing closer cooperation in areas of mutual interest"³³⁵ as well as training, commercial exchanges, and parliamentary visits as a follow-up to the Europe Agreements.³³⁶ Neither trade liber-

329. *EC/Visegrad States: 1996 Remains Target Date for Membership Talks*, Eur. Rep., Oct. 24, 1992, available in LEXIS, Europe Library, ALLEUR File.

330. *Poland-EC Treaty Blocked*, GAZETA WYBORCZA, No. 251, Oct. 24-25, 1992, available in LEXIS, Nexis Library, OMNI File.

331. *Id.*

332. Lionel Barber, *Danube Row Hits Plan to Widen EC*, FIN. TIMES, Oct. 23, 1992, at 4. "So far the EC has reacted coolly because [of] the huge economic disparities." *Id.* "The European Community is likely to tell Poland, Hungary and Czechoslovakia . . . that they are bringing up the rear . . ." McEvoy, *supra* note 263.

333. Andrew Marshall, *EC to Improve Links with East Europe*, INDEPENDENT, Oct. 29, 1992, available in LEXIS, Nexis Library, OMNI File.

334. *Id.*

335. *Id.*; see *Failure of Vision*, INDEPENDENT, Oct. 29, 1992, at 26. "Friendly assurances and pious hopes were in plentiful supply. The reality, however, is that the Community's response to the opportunities in eastern Europe has been shamefully inadequate and short-sighted." *Id.*

336. Marshall, *supra* note 333, at 9.

Major and Delors said they welcomed the meeting as a demonstration of European Community support for all the newly democratising countries of Eastern and Central Europe. The summit agreed to encourage intensified, practical cooperation . . . [F]our areas were marked out: more open and liberal markets, local and democratic links, training and education, and par-

alization concessions nor a specific timetable for accession were obtained by any of the Visegrad group. Commission President Delors stated only that "[a]s soon as it appears that these countries are prepared to join the Community, we will accept them."³³⁷

B. *Looking Ahead*

Attempting to buttress their claims that 1996 represents a realistic target date for commencing accession negotiations, Poland, Czechoslovakia, and Hungary jointly identified those economic objectives that they feel can be achieved over the next several years. These include macroeconomic stability, microeconomic liberalization, external trade liberalization, privatization, and economic restructuring that the three countries anticipate will be greatly accelerated by the establishment of the free trade area between them.³³⁸

Thus, credible predictions of the future can only be based on an assessment of how countries such as Poland are likely to succeed in meeting the objective target of a stable, pluralistic form of government and a Western economic structure. To describe this target as gargantuan in itself is an understatement because the combined effect of World War II and forty-five years of a "centrally planned" economy effectively obliterated the Polish capital market.

Polish President Walesa announced to the Council of Europe in February 1992 that Poland will not be able to stay its current course without considerable continued Western aid. Appealing to the "self-interests" of the West as the basis for sustained economic aid, Mr. Walesa identified, from the Polish viewpoint, the major hurdles confronting its continued transition. First, when Poland undertook the transition to a market economy, the West's most notable response was to flood Polish markets with Western goods, thus draining scarce cash resources, but doing little in the area of modernizing domestic

liamentary links . . . although Mr. Major told a press conference later that there was no fixed timetable for full accession to the EC.

The Week in Europe: Major and Delors Host Visegrad, Summit Press Assoc. Newsfile, Oct. 29, 1992, available in LEXIS, Nexis Library, OMNI File.

337. Marshall, *supra* note 333.

338. *EC/Visegrad States: 1996 Remains Target Date for Membership Talks*, *supra* note 329.

industry and job development, the only factors that can produce long-term political stability.³³⁹ Second, in Polish opinion, the West's recent fiscal passiveness increases Poland's risk of straying from the difficult road to democracy and could even provoke a return to totalitarianism. Third, continued economic difficulties in Poland could give rise to the mass migration of economic refugees of which the West is so fearful. Mr. Walesa also stressed that while foreign investment in Poland may now appear unattractive in the short term, Poland is a highly desirable location for investors.³⁴⁰

President Walesa's words were not per se "news" either to the Community or to other Western countries; they merely tied the principal themes of the East's perceptions together. PHARE recipients other than Poland have repeatedly stated that the amounts of money available are inadequate as compared against their needs.³⁴¹ The Community for some time now has expressed concern that the G-24 funds are no longer forthcoming at the same rate and that the Community itself has been called upon to shoulder an increasing portion of the expenses.³⁴² Nor have the draconian impacts of economic

339. *Walesa Says West Partly to Blame for Rise of "Various Nationalisms,"* BBC, Summary of World Broadcasts, Feb. 19, 1992, at EE/1308/AI/1, available in LEXIS, Nexis Library, OMNI File (stating that "[Walesa] repeated his often stated metaphor that the post-communist societies needed 'a fishing rod not a fish', in other words help from the West that would allow them to stand on their own two feet").

340. Christopher Bobinski, *Poland: Walesa's Vision of Apocalypse Ignored*, OBSERVER, Feb. 9, 1992, available in LEXIS, Nexis Library, OMNI File; *Walesa Urges West to do Business with Poland*, PAP News Wire, Feb. 5, 1992, available in LEXIS, Nexis Library, OMNI File.

341. MERRITT, *supra* note 14, at 74-75. Czech officials have stressed that PHARE is barely a fraction of what they need. Yugoslav officials concluded some time ago that PHARE was "overblown": "[N]ow in 1991 we can see that PHARE is not going to make a big difference in switching Eastern European countries to becoming market economies." *Id.* at 75-76.

342. Mr. Merritt's observation, which predates President Walesa's address, indicates that such a result was long in the making:

There is, though, a trend that is giving rise to concern on both sides of the Atlantic. The United States and the Western European nations are not working together as the single team that had been hoped for. The Europeans complain that the U.S. government has grown steadily less supportive of financial packages for Eastern Europe and appears to take the view that Eastern Europe "is a European problem." About half of G-24 financial assistance is subscribed by the 12 EC nations, and less than seven percent by the U.S. In some cases, Washington has offered only derisory contributions when Brussels has passed round the G-24 hat, notably when raising funds for loans to Czechoslovakia and Hungary.

"shock policies" on the Polish populace gone unnoticed by the world, the high social costs being borne by the average consumer include growing unemployment³⁴³ as inefficient and uncompetitive industries are closed down, recession, bankruptcies, and hyper-inflation.³⁴⁴ Poland's latest political crisis revolved in significant part around the grim necessity of making deep cuts in social spending "at a time when unemployment is soaring and thousands of families are dropping below the official poverty level."³⁴⁵

Both Poland and the West are now realizing that the transitional phase will be more complex and will take longer than first anticipated. The Polish government concedes that too much hope was aroused prematurely that the transition would take a matter of months rather than years.³⁴⁶ As in Czechoslovakia and Hungary, when the newly democratic governments came into power, they were "clear on why the old system ought to be replaced but much less specific on how to achieve economic transformation."³⁴⁷

Measuring democracy is not overly difficult. Its benchmark is free elections, which Poland achieved in October 1991.³⁴⁸ The mechanics of economic restructuring, however, are proving vastly more difficult than political transition. The continued danger to stability is that the well-being of the polit-

Id. at 72-73.

343. A Russian critic of the "shock therapy" approach notes that shock therapy ignores the basic concepts of division of labor in an advanced industrialized society. Most of the people of Czechoslovakia, Poland and Russia have committed their lives to developing highly specialized skills for heavy industries. Vast numbers of these people are being asked to abandon their training and experience, and, without an adequate adjustment phase, take part in an amorphous "market" building itself up from scratch.

Valtr Komarek, *Shock Therapy and Its Victims*, N.Y. TIMES, Jan. 5, 1992, at 13.

344. *Bielecki's Government Presents State of Nation Report*, BBC, Summary of World Broadcasts, Jan. 3, 1992, at EE/1268/B/1, available in LEXIS, Nexis Library, OMNI File.

345. Iwona Knothe, *Poland: Parliament Schedules Meeting to Approve New Prime Minister*, Inter Press, June 5, 1992, available in LEXIS, Nexis Library, OMNI File.

346. *Former Prime Minister Bielecki Admits Making Errors*, PAP News Wire, Dec. 21, 1991, available in LEXIS, Nexis Library, OMNI File.

347. Zielonka, *supra* note 78, at 107.

348. The elections of June 1989, which made Tadeusz Mazowiecki the first non-communist prime minister of post World War II, were in reality only "semi-free," being tied to the existing communist electoral system.

ical structure in large measure depends on the well-being of the economic structure.

As noted above, a combination of various measures of a market economy are utilized. Some analysts stress purely quantifiable measures: currency convertibility, privatization, competitiveness, and efficiency of domestic production within a legal system ensuring their existence.³⁴⁹ Others stress the particular post-communist context in which the transition must take place: an "absolute public and governmental will"³⁵⁰ to make the transition; an "adequate legal framework;"³⁵¹ the government's launching its own initiative "to overhaul infrastructure and foster new industries;"³⁵² substantial investment by private capital; and a successful "transfusion of Western know-how and technology."³⁵³ It emerges as axiomatic that an appropriate legal framework is the common thread that can serve to create, maintain, and promote these diverse elements. Foreign investors are understandably hesitant to plunge into uncharted legal waters. The lack of a sufficient legal infrastructure has hampered European commercial bank financing.³⁵⁴ Experts stress that one of Poland's top priorities must be "a clear legal order."³⁵⁵ Presently, its "ever-changing legal regulations create a lot of confusion and uncertainty" that only serve to reinforce a perception that frequent cabinet reshuffling in unstable governments directly harms foreign firms that have received permission for business activities and the fear that such permission may be modified or revoked by a successor. Because one of the principal means of attaining a free market economy is based upon attracting and maintaining significant foreign investment, an examination of the current, evolving, and projected development of those aspects of Poland's legal system is appropriate. In the immediate future, Polish law will evolve both under the impetus of external forces, such as the Europe Agreements and requests from the

349. Sadurska, *supra* note 12, at 2501.

350. MERRITT, *supra* note 14, at 76 (describing work of Belgian industrialist Andre Leysen).

351. *Id.*

352. *Id.*

353. *Id.*

354. Webb, *supra* note 146, at 17.

355. Whitehead: "Do Not Stop Halfway", RZECZPOSPOLITA, No. 131, reprinted in POLISH NEWS BULL., June 4, 1992, available in LEXIS, Nexis Library, OMNI File.

G-24 donors,³⁵⁶ as well as through domestic efforts to create a legal climate reflective of its political and economic transitional efforts. This transformation will be based on two pillars: accelerated liberalization and privatization.³⁵⁷

C. The Current State of Polish Law and Its Relation to the Development of a Market Economy

Although there has been a major proliferation of small and medium size companies in the private sector,³⁵⁸ other economic prospects appear less than bright. Poland's equivalent of its most recent "state of the union" address³⁵⁹ painted a bleak picture of extensive environmental pollution, recession,³⁶⁰ living conditions among the worst in Europe, persistent inflation, and inefficient manufacturing resulting in ever-lower Treasury revenues.³⁶¹ The report attributed the greatest

356. The G-24 has stressed the need for countries such as Poland to ensure adequate legislative protection of private investment along the lines of existing OECD regulations. 8 Int'l Trade Rep. (BNA) 1556 (Nov. 13, 1991).

357. Cezary Banasinski, *Regional Developments*, 25 INT'L LAW. 755, 771 (1991). Professor Banasinski describes Poland's evolving legal framework as comprising three principle elements: "privatization of the economy's state sector, the decentralization of administration and denationalization of state-owned property, and the reduction of the state's monopolistic position in some domains." *Id.*

358. The Polish Central Planning Agency reports some 1,500,000 private businesses in existence at the end of 1991, a 25% increase over 1990, employing 38% of the total workforce, excluding agriculture. *Poland: Development of Private Sector in 1991*, BBC, Summary of World Broadcasts, Mar. 19, 1992, at EE/WO222/A/1, available in LEXIS, Nexis Library, OMNI File.

359. *Report on Poland's Condition*, NOWA EUROPA, Feb. 11, 1992, reprinted in POLISH NEWS BULL., Feb. 11, 1992, available in LEXIS, Nexis Library, OMNI File.

360. *Report on the State of the Nation*, Rzeczpospolita No. 36, reprinted in POLISH NEWS BULL., Feb. 12, 1992, available in LEXIS, Nexis Library, OMNI File. At the end of 1990 nearly 44% of working households and more than 50% of retirees were living below the official poverty line. *European Update: Doing Business in Poland*, *supra* note 59, at *25.

361. *Cf.* Former Finance Minister Balcerowicz, Remarks to the US-Poland Chamber of Commerce, New York (Mar. 19, 1992). Balcerowicz summarized his view of the positive results produced by his "shock policies" as follows:

(1) The free market has evolved greatly—there is a full supply of all consumer goods, although there is still a preference for Western-made goods on the part of Polish consumers. He stressed that Polish products were becoming increasingly well-made and competitive; (2) while the decline in COMECON trade has hit Poland hard, there is improvement in foreign trade; (3) the Paris Club's reduction of Poland's foreign debt provides a positive impetus for the economy; (4) much progress has been achieved in price levels—over 90% of products are now priced at levels dictated by supply and demand; (5) Polish currency, the zloty, is fully convertible; (6) Poland has an extremely dynamic private sector that has created some 6,000,000 new jobs and

difficulties in the transition to the disappearance of long-time trading partners as a result of the collapse of COMECON and the disintegration of the U.S.S.R.³⁶² The Polish legal system is described as a disjointed hodgepodge of statutes dating from different eras, replete with loopholes and inconsistencies, and thus totally inadequate to address current legislative, social, and economic concerns. Not only do most sectors of Polish life require a complete legislative overhaul, the current complicated legal processes for enacting legislation, adequate perhaps in a period of stability, now operate as a barrier to further reforms.³⁶³

The report's gloomy forecast is already proving to be true as the increased economic pain endured by Poles has produced a political backlash. Poland's current electoral law is a last-minute legacy of the previously communist parliament that pushed the law through in a desperate effort to improve its chances in the first free elections: "[t]he result was a weak and divided parliament . . . which makes effective government impossible."³⁶⁴

1. Constitutional Reform

In the absence of strong and unequivocal constitutional guarantees of property rights in post-communist countries such as Poland, foreign investors may tend to limit themselves to short-term projects with high short-term returns. This in turn can exacerbate their image as "mere speculators" on the part of the Central Europeans.³⁶⁵ Foreign investors must have legal certainty as to their rights of ownership in property that they wish to acquire.³⁶⁶ It is therefore imperative that basic constitutional principles of "separation of powers, federalism, and protection of individual rights (including economic liber-

some 6000 new privately owned business [primarily retail businesses, services and construction]; (7) the basics of a new legal framework are well under way, particularly statutes such as the recent Law on Foreign Investments which permits full repatriation of profits.

Id.

362. *Id.*

363. *Id.*

364. *Make Poland Governable*, FIN. TIMES, May 7, 1992, at 22.

365. Richard A. Epstein, *All Quiet on the Eastern Front*, 58 U. CHI. L. REV. 555, 571 (1991).

366. See Whitehead: "Do Not Stop Halfway," *supra* note 355.

ties)"³⁶⁷ be unequivocally spelled out.

The current Polish Constitution,³⁶⁸ which serves primarily to define state bodies and their respective powers, was enacted in 1952 and was closely patterned on the language and political theory of the 1936 Soviet Constitution. Its net effect was to entrench the Communist Party, rather than the Constitution, as the real source of law over the next three and a half decades.³⁶⁹ This Soviet-influenced document was repugnant to Poles, not only because it espoused "brotherhood" with the Soviet Union, and was highly reminiscent of tsarist oppression in the nineteenth century, but also because it perverted the rules of constitutional law inherent in Poland's own rich centuries-old constitutional history.³⁷⁰ Poland's Constitution of May 3, 1791 is far from being an obscure historical footnote.³⁷¹ On the contrary, during the communist regime that had endeavored to impose the socialist celebration of May 1st, the Polish populace annually braved riot police and even tanks to commemorate the third of May as the symbol of a legitimate governmental model. The prompt reinstatement of May 3rd as a national holiday by the new democratic government was one of the most powerful symbols that Soviet domination was no more. The 1791 constitution was the first written European constitution, and already embodied seven centuries of constitutional development based upon the evolving principles of placing restraints on the powers of the monarchy, of government by consensus and representation of the people.³⁷² Based

367. See Epstein, *supra* note 364, at 557. Professor Epstein makes the following observation concerning constitutional reform in the region that "[i]t will take uncommon foresight, heroic measures and massive good fortune for Eastern Europe to hit upon the constitutional measures and economic policies needed to overcome the devastation wrought by communist political rule and socialist economic order." *Id.* at 557-58.

368. KONSTYTUCJA POLSKIEJ RZECZYPOSPOLITEJ LUDOWEJ [Constitution] (Pol.).

369. Mark Brzezinski, Note, *Constitutional Heritage and Renewal: The Case of Poland*, 77 VA. L. REV. 49 (1991) [hereinafter M. Brzezinski].

370. *Id.*

371. Since the Union of Lublin in 1569, Poland and Lithuania had belonged to an early historical form of federation known as the "Commonwealth of Two Nations." It was a dual state comprising three countries: Poland, Lithuania, and Russia. The latter in turn gave rise to Byelorussia and Ukraine. See generally ADAM ZAMOYSKI, *THE POLISH WAY* 93-94, 105-106 (1987).

372. For example, the Constitution of 1505 already placed important restrictions on the King by precluding the enactment of any laws without the participation of the Seym. See Wagner, *supra* note 85, at 3. Article V of the 1791 Constitution

upon the concept of the separation of powers, it allocated legislative power to the *Seym*, executive power to the monarch and his counsellors, and judicial powers to the court system.³⁷³ The eighteenth century notion of "the people" did not actually mean genuine popular sovereignty in the sense of including the peasantry. However, the notion of citizenry was an increasingly expanding one,³⁷⁴ and the constitution explicitly conferred upon the peasantry unprecedented legal protection.³⁷⁵ Shortly after its enactment, however, Poland ceased to exist as a nation for the next 130 years; it was "partitioned" between Russia, Prussia, and Austria, and thus subject to the oppressive legal orders of the partitioning powers.³⁷⁶ Poland did not reemerge as an independent state recognized by the Treaty of Versailles until after World War I.³⁷⁷ Two constitutions were adopted in the brief time frame of independence, in 1921 and again in 1935; both claimed to reprise the principles of the Constitution of 1791.³⁷⁸ The 1935 document was short-lived, because of the simultaneous German and Soviet invasions in 1939, which were followed by military occupation until 1945, and immediately gave way to four decades of Soviet domination.

Thus, when democratic rebirth commenced in Poland in 1989, the *Seym*, by then firmly controlled by freely elected representatives of Solidarity, announced the creation of a Consti-

spelled out the still-revolutionary notion that "all power in the human community derives from the will of the nation." *Id.*

373. *Id.*

374. *See generally id.*

375. *Id.* "While the peasantry gained no political participation rights from the new constitution, it did entitle them to the 'protection of national law.' Among others things, this meant that contracts between the peasantry and the nobility now had legal standing." M. Brzezinski, *supra* note 369, at 66-67 (citing R. Ludwikowski, *Two Firsts: A Comparative Study of the American and the Polish Constitutions*, 8 MICH. Y.B. INT'L LEGAL STUD. 117, 117 (1987)).

In 1794, a proclamation entitled *Uniwersal Polaniecki*, issued by Tadeusz Kosciuszko (the hero of the American Revolution) vested civil rights in the peasantry. *See* POLISH LAW THROUGHOUT THE AGES, *supra* note 85, at 388.

376. Wacław W. Soroka, *The Law in the Polish Lands During the Partition Periods*, in POLISH LAW THROUGHOUT THE AGES, *supra* note 85, at 119. "The oppressive and discriminatory laws of the occupants were intended to limit the rights of the Polish population with respect to land, property, possessions, religion, and national language and aspirations." *Id.* at 129.

377. *See generally* ZAMOYSKI, *supra* note 371.

378. M. Brzezinski, *supra* note 369, at 73.

tutional Commission for the purpose of drafting an all-new democratic constitution. In the interim, it was, for practical purposes, determined to maintain the basic structure set forth in the 1952 constitution, subject to several immediate amendments mandated by the new political climate³⁷⁹ such as the establishment of the bicameral parliamentary body consisting of the *Seym* and the Senate, the deletion of all references to Poland as a socialist state and the communist party,³⁸⁰ and the restoration of the country's name as the "Republic of Poland." Other amendments were aimed at the reinstatement of a decentralized and locally autonomous governmental structure.³⁸¹ The revised Article 6 of the constitution now guarantees the right and the freedom to carry on activities to all persons, irrespective of their public or private status.³⁸² Other provisions mandate equal treatment of all forms of property ownership in all sectors of the economy.

On the bicentennial date of May 3, 1991, a joint session of the *Seym* and the Senate declared the importance of eventual ratification of the proposed new constitution by both bodies at such time as all of their constituent members would hold such office as the result of fully free elections,³⁸³ thus acknowledging that the representatives voted into office in the elections scheduled for October 1991 would more accurately reflect the will of the citizenry. As of this writing, the draft submitted to the Parliament by the Constitutional Committee³⁸⁴ in late 1991 has been the subject of several parliamentary debates as have alternate drafts elaborated by a senate committee and several political parties.³⁸⁵ While varying to some degree in areas concerning the electoral processes and the precise allocation of powers between the executive, legislative, and judicial

379. *Id.* at 89.

380. *Id.*

381. *Id.* at 90.

382. *European Update: Doing Business in Poland*, *supra* note 59, at *88; see KONSTYTUCJA POLSKIEJ RZECZYPOSPOLITEJ LUDOWEJ [Constitution] (Pol.).

383. Stanislaw Gebethner, *From One Constitution to Another*, *WARSAW VOICE*, May 5, 1991, available in LEXIS, Nexis Library, OMNI File.

384. The Constitutional Committee recommended the establishment of a Constitutional Tribunal, modelled on German law, that would enable private persons to test the constitutionality of legislation. See Andrzej Rapaczynski, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, 58 U. CHI. L. REV. 595 (1991).

385. Gebethner, *supra* note 383.

branches, all have in common a firmly articulated protection of fundamental human rights, due process, and private property rights. After agreement is reached on a final version, it will be submitted to a public referendum prior to adoption.

2. The Commercial Code

The Polish Commercial Code is a prime example of a pre-World War II legislative enactment dating from the period of independence, portions of which either were dormant for decades or were repealed piecemeal under the communist regime, that has a sudden new vitality in a legal system struggling to keep up with political reforms. The Commercial Code first came into existence in 1934. Based on French, German, and Swiss law, it contained several important innovations such as a modern and flexible definition of "merchant" and protection of minority shareholders.³⁸⁶ During the communist tenure, certain provisions of the Commercial Code, such as those dealing with limited partnerships, were suppressed by the introduction of socialist legal norms.³⁸⁷

In August 1991, the *Seym* adopted several amendments to the 1934 legislation. Remarkably, the first of these was actually a reintroduction of the concept of limited partnership which had been repealed in 1964.³⁸⁸ The 1934 Code's original provisions governing general partnerships, limited liability, and joint stock companies, including the regulations concerning their formation and commercial registration, remain entirely viable and are expected to gain increasing importance in view of the fact that they represent the principle mechanisms for establishing private companies in Poland.³⁸⁹

386. See generally Bronislaw Helczynski, *The Law of the Reborn State*, in *POLISH LAW THROUGHOUT THE AGES*, *supra* note 85, at 139 (discussing Polish law between 1918 and 1939). Mr. Helczynski notes that the European codes preceding the Polish Commercial Code relied on an arbitrary and illogical classification of "acts of commerce." The 1934 Polish code introduced a definition of "merchant" as "any person who conducts a profit-making business," and deliberately left the latter term "business" open to a case by case definition.

387. See, e.g., *European Update: Doing Business in Poland*, *supra* note 59.

388. The second amendment, reflecting inflationary realities, increased the minimum capitalization requirements of limited liability companies and joint stock companies. *Id.*

389. *Id.* Some 45,000 private companies, 17,300 cooperatives, and 4800 joint ventures have been established under the Code. *Private Sector Accelerates*, *NOWA EUROPA*, Mar. 17, 1992, at 11, available in LEXIS, Nexis Library, OMNI File.

3. Legislation in Furtherance of a Market Economy—Privatization

Since its empowerment in mid-1989, the *Seym* has enacted more than a dozen pieces of legislation designed to implement free-market economy principles and to attract foreign investment.³⁹⁰ The keystone is a comprehensive legislative and economic program providing for the privatization of the vast majority of business activity formerly carried on solely by the government. The centerpiece is the Act on Privatization of State Owned Enterprises ("Privatization Act" and "SOEs" respectively) of July 13, 1990,³⁹¹ which also established a new Ministry of Privatization ("MOP") to oversee and implement this vast project. Technically, the privatization process involves either an offer to third parties of shares of an SOE (privatization through capitalization) or an offering of the assets of the SOE (capitalization through liquidation). The originally targeted, and in retrospect highly optimistic, scope of privatization was to cover 4000 SOEs of a total 8000 enterprises in the first three years. Thousands of such inefficient enterprises had existed for years solely for the purpose of trade with other COMECON countries "but often provid[ed] sustenance to entire communities."³⁹²

Hoping to effectuate a restructuring of the economy with minimal disruption of ongoing "businesses," the Polish government opted for a "sectoral" approach to privatization. This approach utilizes a macroeconomic concept that is based on identifying a consistent strategy to privatization by sector, as opposed to the needs of a given SOE. The MOP thus undertook a sectoral "mapping" of thirty defined and internationally recognized industrial sectors, ranging from Oil Processing and Distribution to Footwear to various categories of food processing,³⁹³ to ensure that potential investors are provided with

390. In addition to the statutes discussed below, another example is a new income tax law which is more in line with free market entrepreneurial activities. See Law of July 5, 1991 on Income Tax from Individuals, *Dziennik Ustaw* of 1991, No. 80, Item 350.

391. Banasinski, *supra* note 357, at 772 (citing *Dziennik Ustaw* of 1990, No. 51, Item 298, amended by Law of November 29, 1990, *Dziennik Ustaw* of 1990, No. 55, Item 127).

392. *The Way Ahead for Poland*, *FIN. TIMES*, Jan. 21, 1992.

393. EMBASSY OF THE REPUBLIC OF POLAND, COMMERCIAL COUNSELLOR'S OFFICE,

meaningful information and that similar industries are handled consistently. The underlying rationale of this mapping process is that each individual sector presumably encompasses the same type of problems and will be susceptible to the same types of improvements.³⁹⁴ The sectoral approach is also designed to maximize the critical interplay between the legal mechanics of ownership transfer and the ability of these severely outdated and inefficient companies to switch as rapidly as possible to Western norms and technology. The practical benefits that the MOP foresees as resulting from this approach include economies of scale, increased bargaining power due to the MOP's participation and approval of each privatization transaction, and the ability to control "cherry picking" of only the more lucrative SOEs.

a. Privatization Through "Transformation"

i. Public Offerings

The Privatization Act provides two legal mechanisms, "transformation" and "liquidation," for restructuring SOEs and formal transfers of membership. The transformation process involves several stages. The first is full conversion of the SOE into a joint stock or limited liability company which operates subject to the 1934 Commercial Code. The new company assumes all the rights and liabilities of its predecessor.³⁹⁵ The second stage, the actual privatization, takes one of several forms: "Public Offering"; "Trade Sale"; a combination of the foregoing; auction; or via the special Mass Privatization program which the government hopes will become its principal tool.

To render public offerings possible, the State Treasury was authorized to create a stock exchange³⁹⁶ which officially

ECONOMIC AND LEGAL INFORMATION FROM POLAND, No. 9-11, at 2-3 (Sept.-Nov. 1991) [hereinafter ECONOMIC AND LEGAL INFORMATION].

394. *Id.*

395. Banasinski, *supra* note 357, at 772.

396. *See* Law of March 22, 1991 on Public Trading of Securities and Trust Funds, Dziennik Ustaw of 1991, No. 35, Item 155. This statute regulates both the primary and secondary markets in securities and provides the legal framework for the creation of a Securities Commission, stock exchanges, securities firms and trust funds. *See* ECONOMIC AND LEGAL INFORMATION, *supra* note 393, No. 7-8.

became operative in Warsaw in April 1991.³⁹⁷ The new stock exchange, a joint stock company owned by the State Treasury, operates under the supervision of a Securities Commission³⁹⁸ and will eventually be privatized as well. In November 1990, it had already been determined to adopt shareholder acquisition disclosure rules incorporating the EC standards as set forth in the Directive on Major Shareholdings.³⁹⁹ Acquisitions, in excess of an initial ten percent, and in stated increments thereafter, must be made public.⁴⁰⁰ A previous statutory requirement of a government permit for acquisitions by foreigners in excess of ten percent was abolished.⁴⁰¹

Like the 1934 Commercial Code, the new Warsaw stock exchange also represents the continuation of the pre-World War II free market tradition. The original Warsaw stock exchange had been established in 1871; a total of six stock exchanges, accounting for ninety percent of the country's trading volume, existed in Warsaw in 1939.⁴⁰² These were regulated largely by the 1934 Commercial Code. As of this writing, there are several dozen companies officially listed. Trading rules are

397. See Law of March 22, 1991 on Public Trading of Securities and Trust Funds, Dziennik Ustaw of 1991, No. 35, Item 155, art. 1. Article 1(1) of the Polish statute defines the public distribution of securities as "an offer to buy and the purchase or transfer of the rights from securities issued in series, through mass media or in any other way, if an offer is addressed to more than 300 persons or to unspecified persons." *Id.* (emphasis added).

Such a definition appears to neatly circumvent any necessity for minimum capital or market capitalization rules. Cf. Council Directive No. 79/279 of March 5, 1979 Coordinating the Conditions for the Admission of Securities to Official Stock Exchange Listings, amending Admissions Directive, 22 O.J. L 66 (1979).

398. See Law of March 22, 1991 on Public Trading of Securities and Trust Funds, Dziennik Ustaw of 1991, No. 35, Item 155, arts. 6-7. Articles 6 and 7 spell out the composition and the functions of the Securities Commission, inter alia, the obligation to "supervise observance of the rules of fair trade and competition in regard to public trade and securities." *Id.* The Commission is empowered to issue brokerage permits and has authorized new issuances of securities. *Id.* arts. 26, 27, 49, 50.

399. Cf. Council Directive No. 88/627, O.J. L 348/62 (1988).

400. See Law of March 22, 1991 on Public Trading of Securities and Trust Funds, Dziennik Ustaw of 1991, No. 35, Item 155, art. 72(1). Subparagraph (1) of Article 72 requires, for example: "Anyone who has become the owner of company securities which ensure him/her/it to have, respectively, 10, 20, 33, 50, 66, or 75 percent or more votes in the Stock-holders' Assembly, is required to notify the Commission, the Anti-Monopoly Office, and the company within seven days of the fact." *Id.*

401. See *infra* notes 413-16 and accompanying text (discussing 1991 Law on Companies with Participation of Foreign Parties).

402. See ECONOMIC AND LEGAL INFORMATION, *supra* note 393.

modeled on the French “*par casier*” and the German “*Einheitspreis*”: for each traded issue, there is one trading price announced daily and all orders are offered “on the market” with no in-house trading. All shares are in bearer form. The securities are kept as a global certificate for each issue in the National Depository of Certificates.⁴⁰³ Currently planned is a Polish government bond issue to be made available to foreign investors on the stock exchange bearing an interest rate linked to the yield on three month Polish treasury bills. This issue is to be accompanied by one year bonds available only to Polish citizens bearing an interest rate tied directly to the rate of inflation, plus five percent.⁴⁰⁴

ii. Trade Sales

The Trade Sale approach encompasses its own rules and has proven most appropriate for large Western multinationals since there are no comparable domestic investors with sufficient resources. General Motors, Pepsico, Unilever, Phillips, Gerber, and Henkel are a few examples of major partial acquisitions of the most viable SOEs. A government official, usually the “sectoral” specialist, prepares an information memorandum and invites foreign investors to bid. The list of bidders is culled and several are given access to the SOE’s books to engage in due diligence. Subsequently, the bidders submit a binding price proposal and a restructuring plan to the MOP. Concurrent negotiations then commence until an agreement is reached with one of the bidders.⁴⁰⁵

iii. Mass Privatization Program

The Mass Privatization Program (the “MPP”), described by Western experts as ingeniously complex,⁴⁰⁶ envisages the

403. *Id.* To date there have been over 100,000 people purchasing shares, of which some 70,000 opened accounts with brokerage firms. *Stock Market Still Slack*, ZYCIE WARSZAWY, Oct. 20, 1992, at 3, available in LEXIS, Nexis Library, OMNI File.

404. Proceeds are to be partially applied to the budget deficit. Christopher Bobinski, *Poland Offers Bonds to Foreign Investors*, FIN. TIMES, May 12, 1992, at 28.

405. See ECONOMIC AND LEGAL INFORMATION, *supra* note 393.

406. Robinson, *supra* note 226. Not all Western economists have been equally complimentary—a recent assessment by the Adam Smith Institute estimates that on the average, it will take Poland, Hungary, and Czechoslovakia some 28 years to privatize even half of their enterprises. See, e.g., David Watts & Patrick Moser, *East 'bankrupt in five years'*, TIMES, Oct. 20, 1992; Michael Simmons, *Eastern Europe: Privatisation*

creation of National Wealth Management Funds ("NWMFs") to act as the representative of all citizens of Poland, employees, and the State Treasury.⁴⁰⁷ The NWMFs, to be managed by international management firms, will be empowered to borrow funds and to issue and sell shares to both foreign and domestic investors. Polish citizens will receive, free-of-charge, "certificates of participation" which they will be able to trade publicly. The program will affect some four hundred of the more attractive medium to large size SOEs, with at least US\$7,000,000 in turnover. These SOEs will be restructured as follows: ten percent of the shares will be allocated to the employees, thirty percent will be retained by the State, and the remaining portion will be channeled into investment funds.⁴⁰⁸ Political disagreement has impeded significant progress on the MPP to date, thus delaying a prime element in Poland's attempt to achieve a market economy.⁴⁰⁹

b. Privatization Through Liquidation

The Privatization Act permits SOEs to transfer their assets to private ownership by one of three methods: asset sale, joint venture, or employee buy-out. All transactions are closely monitored by and require the approval of the MOP.⁴¹⁰ SOEs in this process are referred to as "Founding Bodies"; the Workers' Council of the SOE initially determines the chosen method of privatization, subsequent to which a Preparatory Team prepares and submits an opinion for MOP's approval. Once approval is obtained, the chosen method is implemented. Payment in installments is available for employee buy-outs.

Dream 'A Sham', available in LEXIS, Nexis Library, Reuter Textline File, Oct. 19, 1992. Mr. Simmons notes that "[t]he report, entitled Eastern Promise . . . is one of the most thorough and pessimistic appraisals of eastern Europe since the collapse of communism in 1989 Up to two-thirds of state enterprises in each country are on the brink of collapse." Id.

407. See Kim Reisman, Note, *The World Bank and the IMF: At the Forefront of World Transformation*, 60 FORDHAM L. REV. S349, S363 (1992).

408. *Poland Hopes for Private Sector to Pull Country Out of Recession*, Int'l Bus. Daily (BNA) (Jan. 6, 1992). In addition to privatization, the Polish government will direct its energies to projects which will build up the country's infrastructure, including transportation, telecommunications, and banking and financial services. *Id.*

409. Robinson, *supra* note 226.

410. *Id.*

c. Other Aspects of Privatization—Municipal Property and “Reprivatization” of Nationalized Property

As an integral part of undoing the legacy of communism, all three Central European countries have had to confront the issue of dealing with property which had been privately held until it was confiscated or nationalized by the respective communist regimes commencing in the late 1940s. The process of returning such property is known as “reprivatization” and constitutes another wrinkle in the economic and legal transition. Hungary and Czechoslovakia have both adopted comprehensive legislative schemes addressing the issue.⁴¹¹

In Poland, the government is reviewing some 72,000 claims for property nationalized under the 1946 Agrarian Reform Decree and the 1946 Act on the Nationalization of Industry. The Polish government anticipates several hundred thousand additional claims. By and large, legal experts agree that to take the position that all communist-regime legislation is invalid is “risky” as well as absurd, because such legislation resulted in legal consequences throughout the duration of the communist regime. The approach advocated is to review all such nationalizations with a view toward whether (1) they were in “excess” of what was actually required by the state at that time and/or (2) the state failed to provide adequate compensation for nationalized property under its own law.⁴¹² If cash payments are made, the budgetary implications will be colossal, if not crippling.

4. Law on Companies with Participation of Foreign Parties

Aimed exclusively at attracting and accelerating the pace of foreign investment, the Law of June 14, 1991 on Companies with Participation of Foreign Parties⁴¹³ (the “June 1991 Act”) embodies important assurances for potential investors. Articles 25 and 26 permit full repatriation of profits (after taxation) and gains from the sale of shares or liquidation of a com-

411. See *Chronology 1991*, *supra* note 296.

412. Krzysztof Fronczak, *Controversial Re-privatisation Bill—Interview with Wojciech Goralczyk, Vice-Minister of Privatisation*, *ZYCIE GOSPODARCZE*, Dec. 15, 1991, available in, LEXIS, Nexis Library, OMNI File.

413. Law of June 14, 1991 on Companies with Participation of Foreign Parties, *Dziennik Ustaw* of 1991, No. 60, Item 253.

pany.⁴¹⁴ The June 1991 Act eliminates prior requirements that foreigners to obtain permits before acquiring shares in privatized companies. Article 1(3) renders the formation, capitalization, and activities of all such companies subject to the provisions of the 1934 Commercial Code.⁴¹⁵ Article 42 establishes a State Agency for Foreign Investment whose objective will be to promote foreign investment.⁴¹⁶

5. "European" Legislation—Approximation of Laws

a. Activities in Anticipation of the Association Agreement

In early 1991, when association negotiations with the EC were just getting under way, Poland created the office of "Plenipotentiary for Foreign Assistance and Poland's Integration with Europe" and directed it to harmonize, coordinate, and supervise the processes aimed at Poland's adaptation and adjustment to the European Communities. With a view toward initiating and organizing activities aimed at creating conditions for Poland's economic and legal integration, a team of experts was constituted to study the adjustment of the Polish legal system to legislative regulations in the EC.⁴¹⁷ One result of this activity was Poland's ability to put into effect the same customs form utilized throughout the Community and EFTA, known as the Single Administrative Document (the "SAD"), as of January 1, 1992, only two weeks after the conclusion of the agreement with the EC.⁴¹⁸ Similarly, efforts to incorporate EC re-

414. *Id.* ch. 3, arts. 25, 26. The mechanisms for such a transfer are illustrated by Article 25:

1. A foreign entity, after payment of taxes due, is entitled to purchase foreign currencies in a foreign exchange bank, in the amount of profits paid by the Company, on the basis of an individual certificate issued by the entity authorized by the Minister of Finance, which performs an evaluation of the yearly financial report (balance sheet) of the Company. 2. A foreign entity is entitled to transfer abroad (transfer of profit) without separate foreign exchange permit, foreign currency purchased in a foreign exchange bank according to paragraph 1.

Id. ch. 3, art. 25, ¶¶ 1, 2.

415. *Id.* ch. 1, art. 1, ¶ 3.

416. *Id.* ch. 5, art. 42.

417. *Government's Plenipotentiary for Foreign Assistance and Poland's Integration with Europe*, PAP News Wire, Mar. 15, 1991, available in LEXIS, Nexis Library, OMNI File.

418. Mirosław Glogowski, *New Way to Declare*, WARSAW VOICE, Dec. 22, 1991, available in LEXIS, Nexis Library, OMNI File. Active preparation for the SAD commenced in early fall 1991.

quirements for product testing, labelling, certification, and other standards were well under way in early 1991.⁴¹⁹

b. Requirements of the Europe Agreement

The Community has insisted on full legal convergence on the part of the three new associate countries to ensure their effective economic integration. Articles 68 and 69 of the Agreement with Poland call for approximation of numerous aspects of existing Polish law to that in effect within the EC, as well as adopting new legislation:

The Contracting Parties acknowledge that a condition precedent of the economic integration of Poland with the Communities is the approximation of Polish legislation to the Community's existing legislation. Poland undertakes to ensure the conformity of its future legislation with Community legislation. The approximation of laws will include in particular the following areas: customs law, partnership law, banking law, accounting and taxation of undertakings, intellectual property, protection of workers in the workplace, financial services, competition law, health and safety law, environmental protection of animal and plant life, consumer protection, direct taxation, technical norms and standards, transport and environmental protection.⁴²⁰

The Polish government confirmed its intention of prompt adherence to the foregoing⁴²¹ and after a long debate on the relative merits and drawbacks of the Europe Agreement, the Polish Parliament ratified the Agreement by a vote of 238 to 78 in July 1992.⁴²² By a resolution also adopted in July 1992, Parliament directed the government to present a timetable for the

419. *Poland-Economic Policy and Trade Practices*, National Trade Data Bank, Feb. 1991, available in LEXIS, Europe Library, ALLEUR File.

420. Reprinted in *Gazeta Bankowa*, No. 4, Jan. 25, 1992 (translated by Author).

421. *We Must Mobilize Forces Anew, Premier Says*, PAP News Wire, Dec. 21, 1991, available in LEXIS, Nexis Library, OMNI File.

422. *Polish Parliament Ratifies EC Association Accord*, Reuter Libr. Rep., July 4, 1992, available in LEXIS, Nexis Library, OMNI File. There were also 20 abstentions. *Id.* Some Polish parliamentarians felt that ratification should be held in abeyance until the agricultural sector is sufficiently restructured to enable Poland's farmers to meet Western competition. *Sejm Concerned Over Agriculture Provisions in Polish-EC Treaty*, *supra* note 243. It is safe to say that a number of Polish parliamentary committees took a hard look at the association agreement and asked tough questions concerning the agreement's impact on Polish sovereignty and the precise fiscal effects of ratification as opposed to rejection.

harmonization process by the end of January, 1993.⁴²³

In a joint agreement with Hungary and Czechoslovakia, Poland has drafted legislation incorporating EC rules of origin and has submitted it to Community officials for verification of compliance with EC rule.⁴²⁴ Poland and Hungary recently announced their intent to work jointly on adjusting their internal legislation to meet EC standards.⁴²⁵ The Polish government has approved three draft laws incorporating EC laws on inventions and patent protection.⁴²⁶ Projected for presentation to the *Seym* is a draft economic and social policy.⁴²⁷ Efforts are under way to bring the overall development of rural areas and farming closer to the EC standard.⁴²⁸

Certain Western analysts have suggested that compliance with EC mandates may actually serve to expedite legislative logjams⁴²⁹ and represents an effective means of resolving at least part of the difficult challenges ahead.⁴³⁰ There appears to be significant merit in this observation since the unifying force underlying Polish foreign policy is, as has been discussed, attaining EC membership.⁴³¹ It is to be hoped that measures which might otherwise encounter parliamentary debate, delay or inaction, will be propelled by this force. Poland's Foreign Minister recently opined that the economic obligations undertaken by Poland in the Europe Agreement will accelerate restructuring of the Polish economy and will ultimately produce economic stabilization.⁴³²

423. *Conference on Harmonizing Poland's and EC Laws Starts Thursday*, PAP News Wire, Oct. 23, 1992, available in LEXIS, Nexis Library, OMNI File. Officials also stress that harmonization must take place within the larger context of economic reform as well as being addressed legislatively. *Id.*

424. *Czechoslovak-Hungarian-Polish Separate Trade Agreement in Sight*, MTI Hungarian News Agency, Mar. 13, 1992, available in LEXIS, Nexis Library, OMNI File.

425. *Poland, Hungary to Cooperate in Adjusting Laws to EC Standards*, PAP News Wire, Sept. 24, 1992, available in LEXIS, Nexis Library, OMNI File.

426. *Government Discusses Plans for Privatisation and Reprivatisation*, BBC, Summary of World Broadcasts, Mar. 12, 1992, at EE/1327/B/1, available in LEXIS, Nexis Library, OMNI File.

427. *We Must Mobilize Forces Anew, Premier Says*, *supra* note 421.

428. *Id.*

429. Roger Boyes, *Freedom Fighters Choose New Chains*, *TIMES*, Dec. 19, 1991.

430. Krause & Schmidt, *supra* note 23.

431. See *supra* notes 175-76 and accompanying text (discussing Poland's goal of EC Membership).

432. *Skubiszewski Says Treaty with EC Will Accelerate Reforms*, PAP News Wire, May 26, 1992, available in LEXIS, Nexis Library, OMNI File.

Certain legal sectors are well advanced in the approximation process. The Anti-Monopoly office has identified the order in which EC competition laws will be approximated.⁴³³ One reason for urgency is that market partitioning for products manufactured under Western licenses was a standard term in licensing agreements entered into between Polish and Western companies in the 1970s, and Poland wants to compel the renegotiation of such agreements.⁴³⁴

D. The Polish Foreign Debt—A Major Obstacle to Attainment of a Market Economy

In the early 1970s, the Communist regime in Poland commenced amassing enormous foreign debt as it made massive purchases of Western licensing and consumer goods in an effort to placate popular dissatisfaction and unrest. After imposing martial law in 1981 and outlawing Solidarity and other hotbeds of political reform, the régime ceased making interest payments on outstanding debt to Western governments when the latter endeavored to ostracize Poland for the new political repressions. This resulted in the steady accrual of additional debt. The IMF recently estimated the total size of Polish foreign debt at US\$45,900,000,000,⁴³⁵ of which about two-thirds is owed to western governmental entities such as the U.S. Export-Import Bank, the Commodity Credit Bank, and their counterparts in other countries.

The post-communist government thus inherited a debt service obligation of such enormous proportions that it threatens to undermine any significant economic progress. Consistent with their stated policy of buttressing Poland's economic transition, Western governments have had little choice but to forgive progressive chunks of the overall governmental debt. In March 1991, the Paris Club of government creditors agreed

433. Fornalczyk, *supra* note 231. "We have selected five sets of [EEC] regulations we would like to apply here to start with: on patent and know-how agreements, mergers and equity buy-outs, commercial agreements providing for granting exclusive rights, and cooperation among businesses." *Id.*

434. *Id.*

435. The total foreign debt of the former "East European" countries is roughly US\$100,000,000,000: Hungary (US\$20,000,000,000); Yugoslavia (US\$16,000,000,000); Bulgaria (US\$10,000,000,000); Czechoslovakia (US\$7,000,000,000); Romania (US\$1,000,000,000). UN Economic Commission for Europe, *Economic Survey of Europe in 1990-1991*, reprinted in PINDER, *supra* note 117, at 52.

to waive thirty percent of Poland's US\$33,000,000,000 government debt with an additional twenty percent to be forgiven in April 1994 if Poland fulfills economic conditions set by the IMF.⁴³⁶ Washington, D.C. in turn forgave about seventy percent of Poland's outstanding debt to the United States of some US\$3,670,000,000. Germany announced it was forgiving roughly half of a US\$5,500,000,000 debt owed by Poland to the German government in efforts to support Poland's transition to a market economy.⁴³⁷ Belgium has just become the fourteenth country to agree to a significant reduction of Poland's debt.⁴³⁸

The future of the additional twenty percent debt reduction offered by the Paris Club is conditioned on Poland achieving and maintaining a budget deficit of no more than five percent of gross national product, an IMF-mandated formula. Poland's earlier inability to stay within accepted targets resulted in the suspension of a three-year, US\$2,500,000,000 credit package granted by the IMF.⁴³⁹

Virtually concurrent with the election of Waldemar Pawlak as Poland's new Prime Minister, the *Seym* approved a budget which does meet the five percent budget deficit limitation set by the IMF.⁴⁴⁰

E. Rejoining the West—Other Aspects of the Polish Endeavor

The growing status and role of the three newest EC associates is increasingly evident. In March 1992, they were for the first time invited to participate in a scientific council sponsored by OECD Member States,⁴⁴¹ and may soon be assigned a lim-

436. *Poland: Sponsored Section—Debt Relief—An Important Breakthrough*, Reuter Textline, Aug. 30, 1991, available in LEXIS, Nexis Library, OMNI File.

437. Ferdinand Protzman, *Bonn Cancels Half of Debt Poland Owes*, N.Y. TIMES, Feb. 20, 1992, at D3; *Germany to Forgive Half of Poland's Official Debt*, CHRISTIAN SCI. MONITOR, Feb. 20, 1992, at 4.

438. Belgium reduced the debt of \$305,000,000 by 30% effective immediately, and will further reduce by another 20% between 1994-2009 contingent upon Poland's compliance with the IMF mandated budgetary standards. *Belgium to Reduce Poland's Debt*, POLISH NEWS BULL., June 4, 1992, available in LEXIS, Nexis Library, OMNI File.

439. Stephen Engelberg, *Polish Government Completes a Budget Approved by I.M.F.*, N.Y. TIMES, Mar. 19, 1992, at A9.

440. Philippa Fletcher, *Poland's Young New Premier Takes Up the Challenge*, Reuters, June 6, 1992, available in LEXIS, Nexis Library, OMNI File.

441. *CSFR-Hungarian-Polish Representation for First Time at OECD Conference*, BBC,

ited role at EC summit meetings.

The range of Polish activities directed at closer ties with the Community is by no means limited to the four corners of the Europe Agreement nor are Poland's efforts to rejoin the West limited to the EC. Significantly, Poland's democratic reforms have enabled it to meet the qualifications for admission to the Council of Europe, in which it now participates as a full member.⁴⁴² Poland has also joined, as noted above, newer groupings such as the North Atlantic Cooperation Council and the Baltic Cooperation Council.⁴⁴³ The measures Poland is taking are intended not only to improve its chances for accession to the European Community but to take what it considers its rightful place in the community of nations. With these objectives in mind, Poland, in January 1992, became one of the original signatory parties to the European Energy Charter which will ultimately result in concrete sectoral protocols on energy-related matters on a European basis.⁴⁴⁴ Poland has agreed, as have other Central and Eastern European states, with the EC's European Parliament to collaborate on a pan-European Transport Charter.⁴⁴⁵

Poland is currently renegotiating its protocol with GATT.⁴⁴⁶ Consistent with its amending of the 1952 constitution with a declaration that Poland is "a law-abiding state," it was the first East European state to file a declaration with the United Nations accepting the jurisdiction of the International

Summary of World Broadcasts, Mar. 13, 1992, at EE/1328/A1/1, available in LEXIS, Nexis Library, OMNI File.

442. *Bielecki's Government Presents State of Nation Report*, *supra* note 297. Participation in the Council of Europe has great meaning for the new democracies: "Council membership is coveted as a stepping stone [sic] to the economic privileges of membership in the European Community. As proof of a functioning parliamentary democracy, membership is also a seal of approval that can open the door to credit lines in Western money markets." George D. Moffett III, *European Body's Role Expands*, CHRISTIAN SCI. MONITOR, Feb. 12, 1992, at 9.

443. See *supra* notes 214-16 and accompanying text (discussing Poland's new membership in international organizations).

444. In addition to the EC Member States, the EFTA nations, 12 former Soviet republics, Bulgaria, Czechoslovakia, and Hungary are participants. *12 Former Soviet Republics are Among Signers of European Energy Charter*, 9 Int'l Trade Rep. (BNA) 37 (Jan. 1, 1992).

445. *EC/Eastern Europe: MEPS for Social Market Economy*, Transport Europe, Oct. 29, 1992, available in LEXIS, Nexis Library, OMNI File.

446. *Poland's Economic Programme: Stabilisation & Transition to the Market Economy*, PAP News Wire, May 10, 1991, available in LEXIS, Nexis Library, OMNI File.

Court of Justice.⁴⁴⁷ Poland has also entered into a series of bilateral friendship treaties with individual EC Member States.⁴⁴⁸ The most important treaties are two agreements entered into with reunited Germany: the first, in November 1990, which assures the Polish western border with Germany, and a Treaty on Good Neighborliness and Friendly Cooperation in June 1991.⁴⁴⁹

Movement toward regional cooperation has increased steadily. Poland has joined the "Pentagonale" group, formed in 1989 by Austria and Italy to funnel technical expertise and resources to Hungary, Czechoslovakia, and, initially, Yugoslavia.⁴⁵⁰ Cooperation along the lines of the "Visegrad trio" is manifesting itself in the form of joint communications to the EC,⁴⁵¹ and is anticipated to increase with the establishment of a free-trade zone in 1993 modeled both on the Europe Agreements and the EEA.⁴⁵² Polish and German representatives have recently met to explore the feasibility of a "Pomeranian Euroregion."⁴⁵³

Relations with the EFTA countries are taking on increasing momentum as the EFTA countries move steadily toward closer economic cooperation with the countries of Eastern

447. Renata Szafarz, *Poland Accepts the Optional Clause of the ICJ Statute*, 85 AM. J. INT'L L. 374 (1991).

448. Adam Bromke, *Polish-Western Relations in a New Way*, SZTANDAR MŁODYCH, Nov. 8-11, 1991, at 1 (Germany, France, Italy, Britain, and the U.S.).

449. See Wladyslaw Czaplinski, *The New Polish-German Treaties and the Changing Political Structure of Europe*, 86 AM. J. INT'L L. 163 (1992).

450. MERRITT, *supra* note 14, at 46.

451. The three countries agreed some time ago to link forces to expedite and coordinate their respective efforts for speedy accession to the EC via increased economic, political, and security cooperation amongst themselves. Vaclav Havel of the CSFR remarked that "[w]e agreed that we will apply to the European Community together . . . if we join our voices, our demands will be heard more strongly, than if we act individually." Ariane Genillard, *EC Applicants Seek to Speed Entry: Czechs, Poles, and Hungarians to Step Up Co-operation*, FIN. TIMES, May 7, 1992, at 2.

452. *Poland, Hungary to Cooperate in Adjusting Laws to EC Standards*, PAP News Wire, Sept. 24, 1992, available in LEXIS, Nexis Library, OMNI File. It appears to be Hungary which was the impetus behind proposals for greater economic and military cooperation. See, e.g., *Antall-Defence Ministers of Visegrad Triangle*, MTI Econews, Mar. 6, 1992, available in LEXIS, Nexis Library, OMNI File; Jonathan Lynn, *Three East European States Prepare Trade Zone*, Reuters, Mar. 24, 1992, available in LEXIS, Nexis Library, OMNI File.

453. *Pomeranian Euroregion Discussed by Polish, German Officials*, PAP News Wire, Oct. 20, 1992, available in LEXIS, Nexis Library, OMNI File.

Europe.⁴⁵⁴ Hungary and Poland are in the final phases of negotiating free trade agreements with the EFTA countries,⁴⁵⁵ whereas Czechoslovakia and EFTA have already formally concluded such an agreement.⁴⁵⁶ Clearly, EFTA has been engaged in an outreach effort to the Central and Eastern European countries, supplying them with advice on matters pertinent to a free-market economy and endorsing their future participation as observers at EFTA consumer protection board meetings.⁴⁵⁷ As mentioned above, Poland would not like to see membership in EFTA as a mandatory condition precedent to EC membership. Notwithstanding this, entry into EFTA is an option Poland may be wise to consider. The relative ease with which the current EFTA applicants will be taken into the EC fold and the fact that EFTA will likely have no alternative but to take in new countries or else cease to exist when most of its present membership "defects" to the EC, indicates that even as an "antechamber," EFTA could provide significant benefits on the road to European integration.

VI. PRIOR ACCESSIONS TO THE EC—A USABLE BLUEPRINT FOR POLAND?

A. "Approfondissement Ou Élargissement"—*The Longstanding Debate*⁴⁵⁸

The question of whether the Community should "widen," that is, expand to admit new Member States, or direct its efforts at "deepening" the internal ties between existing members dates back many years and is not merely a by-product of the current drive of "1992." The Commission is preparing a report on the implications of enlargement. Following the ac-

454. *With EEA Treaty in Limbo, EFTA Countries Look East*, Eurowatch, Mar. 6, 1992, available in LEXIS, Europe Library, ALLEUR File. Czechoslovakia and EFTA already have in place a free trade agreement. *EFTA Initials First Trade Agreement with Eastern European Country*, Eurowatch, Mar. 20, 1992, available in LEXIS, Europe Library, ALLEUR File.

455. Hungary and Poland are reportedly "holding out" for greater trade concessions in the area of unprocessed farm products. *See Hungary and EFTA*, MTI Econews, Mar. 4, 1992, available in LEXIS, Nexis Library, OMNI File.

456. *EFTA Initials First Trade Agreement with Eastern European Country*, *supra* note 454.

457. *Consumer Protection Laws Lacking in 'New' Eastern Europe, Says EFTA*, Eurowatch, Mar. 20, 1992, available in LEXIS, Europe Library, ALLEUR File.

458. Dagoglou, *supra* note 15, at 153.

cession of Spain and Portugal in 1986 and the enactment of the SEA, the objective of "deepening" internal Community ties was, as noted above, generally acknowledged and accepted as having greater immediacy. But, just as today the Community views Eastern Europe as an entirely new frontier and questions the suitability of those countries to join the ranks of Member States, the Community once viewed the admission of the "southern states" of Europe, Greece, Portugal, and Spain with the same misgivings.⁴⁵⁹ It is instructive to look back to the early 1980s, when Greece had already joined but lengthy negotiations with Spain and Portugal were still ongoing, and examine contemporaneous discussions of the Community's perception of the difficulties of integrating new members.⁴⁶⁰ One concern was the perceived loss of economic and social "homogeneity" that southern accession would entail. There also existed a fear of mass workers' migrations to the wealthier northern states. Further, the agricultural output of the south was largely incompatible with the CAP. These same reservations are recognizable in the present day context of the East. Not only are the subjective criteria reminiscent thereof but the economic deficiencies are not dissimilar to those once prevalent in southern Europe.⁴⁶¹

Such similarities have not escaped the notice of current membership hopefuls. Leszek Balcerowicz⁴⁶² of Poland, observed that while he does not anticipate EC membership in less than a decade, it should be viewed as within reasonable reach. "We are following a path that has already been cleared. Other countries, poorer and less industrialised than the six founding members, have followed this path before us: Spain, Greece, Portugal We are by no means unique with our poverty,

459. *See generally id.*

460. *Id.*

461. *Id.* at 151-52. The common "shortcomings" of the southern states, as identified by Dagoglou below, are arguably equally apposite to the East Central European countries today: "(i)—The infrastructure of their economy is still at a low level (ii)—Their industrial productivity is low by EC standards (iii)—Their agricultural productivity is low by EC standards (iv) Their agriculture does not produce mainly C.A.P. favoured products." *Id.* at 151.

462. Former Minister of Finance and the author of the economic "shock policies."

under-development and our objections"⁴⁶³ Other observers discern additional parallels; not unlike Spain and Portugal in the 1970s and early 1980s, political parties in the new democracies are led by well-known personalities (e.g., Vaclav Havel in Czechoslovakia, Lech Walesa in Poland) whose political parties suffer from internal divisions and difficulty in enforcing their political will.⁴⁶⁴

The Community-wide social "homogeneity" which the EC once preserved zealously is a thing of the past, but it is likely to become a regional phenomenon in the Community of the future. Just as the southern states have certain aspects in common, so do the Central European nations. The nordic countries that will probably accede to the EC may share an even greater number of characteristics in common than the first two groupings, ranging from a uniform religious orientation to a keen commitment to social welfare and "their belief in the superiority of the Scandinavian social model."⁴⁶⁵

B. Mechanisms Developed by the Community for Dealing with Less Affluent Member States

For numerous years prior to its recent activities aimed at Eastern Europe, the Community itself had extensive experience with development aid, both externally and, more importantly, on an intra-Community basis. This experience has rendered possible the successful integration of "poorer" Member States such as Greece, Portugal, Ireland, Northern Ireland, and parts of Spain and Italy that were significantly less developed than the states comprising the Community at the time of their accession. Integration, however, is an ongoing process, and the Community's chosen methods of effectuating it underscore that less developed countries have not been expected unrealistically to catch up in less than sufficient time frames.

The enactment of the SEA⁴⁶⁶ brought into the EEC Treaty a stated commitment, via Article 130(a), to attain "economic and social cohesion" by reducing the disparities between the

463. *Agreement with EEC Signed*, GAZETA WYBORCZA, No. 293, Dec. 17, 1991, available in LEXIS, Nexis Library, OMNI File.

464. *See id.*

465. Max Jakobson, *Here Comes a Nordic Invasion of Unwary Europe*, INT'L HERALD TRIB., Mar. 11, 1992.

466. Single European Act, *supra* note 3, § III (v), art. 23.

various regions and the backwardness of the least-favored areas.⁴⁶⁷ Article 130(b) of the EEC Treaty addresses a series of fiscal mechanisms aimed at promoting economic growth in the above-referenced regions by establishing "structural funds" for these purposes.⁴⁶⁸ These mechanisms are known as the "European Agricultural Guidance and Guarantee Fund," the "European Regional Development Fund," and the "European Social Fund." They are financed largely by the European Investment Bank. Illustrative of the Community's emphasis on propelling lagging economic areas to greater productivity and prosperity is the fact that the structural funds are set to double as of 1993.⁴⁶⁹ All southern Member States, including portions of Italy, and Ireland head the list of top-priority recipients.⁴⁷⁰

The EC has drawn its official "poverty" line as being below fifty percent of the average EC Gross Domestic Product ("GDP"). It is telling to note that as recently as 1990, Portugal's GDP was fifty-three percent of the EC average, Greece's was fifty-eight percent and Ireland's was sixty-three percent.⁴⁷¹ In contrast, Czechoslovakia and Hungary were sixty-six percent and fifty-three percent respectively.⁴⁷² Portuguese farming, for example, even several years after accession, continued to consist predominantly of subsistence farming, and continued to be the least productive in Europe, as it had been for twenty-five years.⁴⁷³ It remains uncertain whether the Portuguese will be able to reach EC farming standards prior to the

467. EEC Treaty, *supra* note 1, art. 130(a).

468. *Id.* art. 130(b).

469. *Regional Policy: The "Paquet Delors II"—Building on the 1988 Reform of the Structural Funds*, RAPID, Feb. 12, 1992, available in LEXIS, Europe Library, ALLEUR File.

470. *Id.*

471. *Europe's Open Future*, *ECONOMIST*, Feb. 22, 1992, at 47.

472. *Id.*

473. Merrill Stevenson, *Another New World: More Do Less*, *ECONOMIST*, May 28, 1988, at 31. Portugal had major agricultural obstacles to overcome as it joined the Community: the technical level of farming was significantly lower than in the rest of the EC; its agricultural prices were substantially higher; and the prospect loomed of massive underemployed farm workers as farming becomes more efficient. In the first five-year phase of EC transition, Portugal had the sizeable task of developing EC-style market organizations, liberalizing prices, and abolishing state subsidies. Portugal initially received ECU700,000,000 from Brussels to reorganize its agriculture. More than 8000 improvement projects were approved in 1987 alone for improving rural roads, irrigation, electrification, technical training, and commercial marketing structures. *Id.*

end of this decade.⁴⁷⁴

In the case of the southern expansion of the EC, international and domestic awareness of the Community's commitment to extend future membership to Portugal and Spain exercised a steadying influence on their evolving democracies over an eight-year period. The ramifications of this concrete illustration of the Community's support for their political reforms represented not only a symbolic benefit but also a *de facto* step in the direction of preserving peace and liberty, as foreseen by the drafters of the EEC Treaty.⁴⁷⁵

CONCLUSION

At the outset of this discussion, reference was made to Professor Frowein's conviction that the nature of today's European Community cannot be grasped without some understanding of the last six decades of European history.⁴⁷⁶ The critical historical juncture for the emergence of the Community arose from the overall devastation wrought on its Member States by World War II. The massive reconstruction effort implemented at the Western end of Europe under the auspices of the Marshall Plan rendered possible the reintroduction of democratic institutions and industrial revitalization of those very countries which now form the core of the Community's present affluence and influence, in particular Germany and France.

Eastern Europe, caught by Stalinism, was arbitrarily deprived of these benefits and instead was forced to mold its post-war recovery along the lines of an impracticable, primitive, and economically unworkable ideology—communism. On the heels of the very recent demise of communism as the centrifugal force in the region, countries such as Poland are now attempting wholeheartedly to retrace four decades of economic and political divergence from their western neighbors and trying to compress this vastly difficult and complex process into a span of several years, albeit without any certainty of success. Astutely, they have assessed their chances of success as

474. *Id.*

475. Nancy Weingardt, *Portugal's Accession and Integration Into the European Economic Community*, 15 DEN. J. INT'L L. & POL'Y 317 (1987).

476. See *supra* note 19 and accompanying text (discussing Professor Frowein's thoughts for the future of the EC).

being best assured by prompt entry into the EC fold. History demonstrates that EC membership has worked wonders for the economies of the southern tier of EC Member States and there is little doubt it would do the same for countries such as Poland. In the not-so-distant past, the very existence of definite membership prospects played a role in solidly entrenching the processes of democratic government in Greece, Portugal and Spain. The critical question, therefore, is just how far along on the path to a free market economy will Poland need to be before the EC fully opens the door?

The EC's new "union" treaty codifies the concept that Member States may proceed at varying speeds toward the achievement of common objectives such as monetary union. The Community now appears cognizant of the ultimate inevitability of a future expansion which will include the East Central European countries and even members of the current Confederation of Independent States. In the immediate future, this recognition will be actively carried forward by the UK and by Germany. It is clear that from the EC's overall point of view, the proverbial ball is largely in the court of the aspiring members; the association agreement provide only chances, not assurances. However, it is equally clear that without continued active financial and technical assistance on the part of the EC and its western industrialized partners, the full breadth and scope of economic transition will be very difficult to complete.

Poland must therefore persevere in its transitional efforts and should give some thought to improving its public, international image, which the Western press has recently been portraying as increasingly xenophobic and inclined to await further Western handouts passively. Concrete recommendations, synthesized from various sources, include the following:

(1) continue to expand regional trade and political cooperation with Hungary, Czechoslovakia, and the Baltic states, drawing on the EC-EFTA experience.

(2) maximize the "political dialogue" aspect of the Europe Agreement and continue to align external foreign policy with that of the EC as it has done with the recognition of the Ukraine and Byelorussia, for example.

(3) increase its domestic pool of expertise in EC law and languages to ensure that Polish representatives are vested with

both substantive knowledge and as the ability to make Poland's voice heard on all matters of common interest.

Brussels, like Washington, is a forum accustomed to the well-organized lobbying activities of foreign interests. However, unlike in the United States, Poland lacks the equivalent of a powerful Polish-American lobby, and must therefore expeditiously acquire and utilize the skills necessary to convey its opinions and concerns to Community officials.

The EC, in turn, should consider whether the almost inevitable revamping of its wasteful Common Agricultural Policy could not also be utilized to successfully market, on a world-wide scale, those agricultural products of which Poland is already a net exporter. Revenues generated could be applied to uses similar to those of the existing structural funds.

The southern expansion of the EC was long preceded by agreement "in principle" that those nations should be granted membership status; a similar phenomenon is now gaining momentum throughout the Community as regards Central Europe. In the case of its southern neighbors, the Community acknowledged that their accession represented a joint and profitable "investment in the democratic future of Europe."⁴⁷⁷ It is now appropriate, and in fact imperative, that the Community apply the lesson learned to its eastern neighbors as well. Otherwise, borrowing Professor Weiler's words, "we have made little progress if the *Us* becomes European (instead of German or French or British) and the *Them* becomes those outside the Community or those inside who do not enjoy the privileges of citizenship."⁴⁷⁸

477. Dagtoglou, *supra* note 15, at 162, (citing 2 EC BULL., No. 1, 6, 10 (1977)).

478. Weiler, *supra* note 70, at 2482.